Supreme Court, U. S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

80-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

ELIOT H. WEISMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN OSTROW
GRAND & OSTROW
375 Park Avenue
New York, New York 10152
Attorneys for Petitioner

TABLE OF CONTENTS

CITATIONS .....

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

1. THE INTERPRETATION OF RICO'S "PATTERN" REQUIREMENT BELOW EFFECTS A MAJOR, UNWARRANTED EXPANSION OF THAT STATUTE 8

2. THE COURT BELOW ALSO MISCONSTRUED RICO WHEN IT RULED THAT CONSPIRACY COULD BE A SEPARATE PREDICATE ACT 12

3. THE COURT BELOW HAS COMMITTED GRAVE ERROR IN REFUSING TO SUPPRESS WEISMAN'S CONFESSION AS THE FRUIT OF AN UNCONSTITUTIONAL ARREST 14

4. THE COURT BELOW HAS COMMITTED GRAVE ERROR IN HOLDING THAT WEISMAN WAIVED HIS REVERSE IMMUNITY CLAIM 16

5. THE COURT BELOW ERRONEOUSLY FAILED TO ADDRESS WEISMAN'S ARGUMENT THAT THE DISTRICT COURT COMMITTED SUBSTANTIAL ERRORS WITH REGARD TO THE SECURITIES FRAUD COUNTS 17

A. The District Court, in its Charge to the Jury on "Principal Operator" and "Promotor," Impermissably Extended the Requirements of Disclosure Under the Securities Laws and Regulations 17

B. The District Court's Admission of Bodywires Worn by the Government's Informant Violated Weisman's Sixth Amendment Right to Counsel 19

CONCLUSION 20

CITATIONS

Cases

	Page
Brown v. *Illinois,* 422 U.S. 590 (1975)	15
Connally v. *General Construction Co.,* 269 U.S. 835 (1926)	14
Crawford v. *United States,* 212 U.S. 183 (1908)	17
Massiah v. *United States,* 377 U.S. 201 (1964)	19
United States ex rel Gockley v. *Myers,* 450 F.2d 232 (3d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972)	15
United States v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977)	9. 10
United States v. *Chovanec, et al.,* 467 F. Supp. 41 (S.D.N.Y. 1979)	11
United States v. *Culbert,* 435 U.S. 371 (1978)	14
United States v. *DePalma,* 461 F. Supp. 778 (S.D.N.Y. 1978)	1
United States v. *DePalma,* 461 F. Supp. 800 (S.D.N.Y. 1978)	1, 6, 15
United States v. *DePalma,* 476 F. Supp. 775 (S.D.N.Y. 1979)	7
United States v. *Edmons,* 432 F.2d 577 (2d Cir. 1970)	15
United States v. *Field,* 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir. 1978)	10, 11
United States v. *Henry,* No. 79-121 (U.S. Sup. Ct. July 16, 1980)	19
United States v. *Kaye,* 556 F.2d 855 (7th Cir. 1977), *cert. denied,* 434 U.S. 921 (1977)	11
Unitcd States v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976)	11
United States v. *Sutton,* 605 F.2d 260 (6th Cir. 1979)	9

Cases

	Page
United States v. *Turkish,* F.2d (Docket Nos. 79-1326, 79-1396, May 27, 1980)	7
United States v. *White,* 386 F. Supp. 882 (E.D. Wis. 1974)	12
Wiborg v. *United States,* 163 U.S. 632 (1895)	17

Statutes, Regulations, Senate Reports and Articles

Statutes

	Page
18 U.S.C. §1961, *et seq.*	1, 2, 3, 4, 8, 9, 10, 12
18 U.S.C. §3575	10
Securities Act of 1933, 15 U.S.C. §77f	18
Securities Act of 1933, 15 U.S.C. §77aa	18

Regulations

17 C.F.R. §229.1, *et seq.*	18
§229.20	18
§230.405	18
§230.410	18

Senate Reports

S. Rep. No. 617, 91st Cong., 1st Sess. (1969)	10
S. 1623, 91st Cong., 1st Sess. (1969)	13
S. Rep. No. 553, 96th Cong. 2nd Sess. (1980)	11

Articles

46 Notre Dame Lawyer 55 (1970) 10, 11

Petitioner, Eliot H. Weisman ("Weisman") asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on April 4, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears as Appendix A to the petition. The opinions of the United States District Court for the Southern District of New York (Sweet, J.) are reported at 461 F. Supp. 778 (S.D.N.Y. 1978) and at 461 F. Supp. 800 (S.D.N.Y. 1978). Relevant portions of those opinions appear as Appendix B to this petition. A later opinion of that court, not officially reported, appears as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1980. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on June 10, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and under the general supervisory powers which this Court exercises over the federal courts.

QUESTIONS PRESENTED

1. Does the "pattern of racketeering activity" proscribed by 18 U.S.C. §1962(c), the enterprise racketeering statute ("RICO"), defined in 18 U.S.C. §1961(5) as "requir[ing] at least two acts of racketeering activity . . .

within ten years . . ." require proof of some factual or logical nexus between the two or more predicate racketeering acts?

2. May conspiracy be charged as a separate predicate act of racketeering under the RICO statute, 18 U.S.C. §1961(1)?

3. When the Government deliberately arrests an individual without probable cause as a pretext to induce his cooperation, does the Government's misconduct require suppression of statements made by the individual during the three day period of his improperly induced cooperation?

4. May a defendant be held to have waived the claim that he was denied due process by the Government's failure to grant use immunity to two witnesses who could have exculpated him when he relied on the District Court's rule that a motion made by one defendant applied to all?

5. In deciding whether a defendant has committed securities fraud by failing to disclose in a prospectus covering publicly offered securities that certain individuals were "principal operators and promotors", should the jury, in the face of a detailed statutory and regulatory framework, be permitted to apply their own individual definitions of those terms?

6. Are incriminating statements deliberately elicited by the Government from an individual against whom the accusatorial process has begun admissable at trial?

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §§1961, 1962 and 1963 are set out in the statutory addendum ("Add.") annexed hereto.

STATEMENT OF THE CASE

Petitioner Weisman was the President of the Westchester Premier Theatre (the "Theatre"), an entertainment facility located in Westchester County. It opened in March, 1975, went into Chapter XI bankruptcy in December, 1976, and finally closed its doors in December, 1977.

The Government charged that the Theatre was conceived and collapsed by criminal means. Specifically, the Theatre was said to have been constructed with funds obtained by the fraudulent sale to the public of Theatre stock in 1974. The sale was said to have been effected by means of a false prospectus filed with the Securities and Exchange Commission ("SEC"), and various manipulative devices or arrangements were allegedly entered into to insure that the stock offering would be successful.

In addition to the alleged stock fraud, the Government charged that Weisman and others skimmed monies received by the Theatre from ticket sales and other concessions, skimming which allegedly precipated the Theatre's 1976 bankruptcy petition and continued thereafter.

The most serious charge in the indictment against Weisman was that he violated 18 U.S.C. §1962(c), the enterprise racketeering statute commonly known as RICO. The constituent elements or predicate acts of that offense were the numerous substantive securities fraud and bankruptcy fraud charges in the indictment and the conspiracy charges.

The context in which the issues raised by Weisman in this petition arose, as well as the rulings of the Second Circuit Court of Appeals, are presented below. Weisman's motion for rehearing and suggestion of rehearing *en banc* were denied.

The RICO Counts

Under the District Court's charge to the jury, the jury was permitted to find Weisman a "racketeer" in violation of 18 U.S.C. §1962(c), subject to a twenty year sentence, if they found him guilty of any two of the twenty-three charges in the indictment, whether or not the two charges were in any way interrelated. The jury was also permitted to consider conspiracy to commit securities fraud or bankruptcy fraud as a distinct predicate act of racketeering, even though the substantive and conspiracy charges emanated from a single episode of wrongdoing. Basing its conclusion on a selective reading of the legislative history, the Court of Appeals affirmed this interpretation of the RICO statute, effectively turning RICO into a statute of unlimited application.

Weisman's Pretext Arrest

The bankruptcy fraud charges against Weisman were based in large measure on statements Weisman made to the Government on September 16, 1977 immediately after his arrest on totally unrelated charges and three days later. The facts with regard to that arrest are as follows.

On September 16, 1977, Weisman was arrested on charges that he and his wife had made false statements on a mortgage application in violation of 18 U.S.C. §1014. As the District Court later found, the arrest was illegal in that the complaint alleged no facts in support of the charges, and none were given to the Magistrate who issued the arrest warrants (Tr. 632-33).[1]

[1] "Tr." in this petition refers to the transcript of the second trial, except that in the Statement of Facts and argument relating to Weisman's suppression argument, "Tr." refers to the transcript of the suppression hearing. Both transcripts are part of the record on appeal.

In addition, the purpose of the arrest was *not* to initiate *bona fide* criminal proceedings for bank fraud; rather it was to pressure *Weisman* into cooperating in the unrelated Theatre investigation. As the Government in effect conceded, even the timing of Weisman's arrest was calculated to persuade him to cooperate in the Theatre investigation (Tr. 753). Although his whereabouts were well known (Tr. 711), he was not arrested until mid-afternoon on September 16, a Friday, three days after the arrest warrants were issued.

No effort was made to promptly bring Weisman before the Magistrate for arraignment. Rather, the plan was to process and interview him first (Tr. 657, 660, 665-66). He was given *Miranda* warnings. Then he was told he faced lengthy imprisonment of up to twenty years for racketeering in connection with the Theatre operations, and that a warrant was outstanding for his wife's arrest on the bank fraud charge, and he was asked to cooperate in the Theatre investigation (Tr. 599, 671-72, 753). He agreed, and in the six hours of questioning which ensued, no further questions were asked concerning the bank fraud charge on which he was arrested (Tr. 602).

Weisman was released on his own recognizance after questioning ceased on the night of September 16. It was not until the next day that, in a highly unusual procedure, he was instructed to appear at the home of a District Court judge for arraignment.

With the illegal arrest continuing to hang over his head and the threat to arrest his wife not withdrawn, Weisman continued to "cooperate" and agreed to meet with the FBI agents on Monday, September 19, 1977. He had not consulted with his lawyer at any time during this

period.[2] On the 19th he signed another advice of rights form, further discussed ways in which he could cooperate, and responded to additional questions concerning the activities at the Theatre.

Finally, a third meeting was set for October 4, 1977 in the office of the United States Attorney but at that meeting Weisman refused to answer any further questions. The Government, of course, never prosecuted the bank fraud case; in fact, according to the docket entry, the complaint was dismissed on October 2, 1977, a Sunday.

Based on these facts, the District Court suppressed Weisman's September 16 statements, finding the arrest illegal because there was no probable cause to believe Weisman had committed a bank fraud in 1976 and because the bank fraud arrest was a mere pretext designed to induce Weisman to cooperate in the Government's investigation into the Theatre. However, the Court refused to suppress the September 19 statements citing the three days time span between the arrest and the statement, the fact he was arraigned, and various other "intervening" factors, *United States* v. *DePalma,* 461 F. Supp. 800, 831-35 (S.D.N.Y. 1978). (App. B-17, B-18).

The Circuit Court agreed, finding that the deliberate use of a pretext arrest to induce cooperation was not misconduct flagrant enough to warrant the application of the Fourth Amendment exclusionary rule.

---

[2] During the initial processing he asked when he could call a lawyer but the request was never honored (Tr. 661-62, 689). In fact, through September 19 the Government tried to dissuade him from contacting his lawyer by suggesting that DePalma, later a co-defendant and also one of his lawyer's clients, would thereby learn of his cooperation (Tr. 742-43).

Reverse Immunity

The only significant evidence against Weisman on the stock fraud charges was the testimony of three men, professional criminals to whom the Government gave extensive immunity. Weisman could only rebut a significant portion of their testimony directly through the testimony of two individuals, who as targets of a continuing grand jury investigation, refused to testify at trial without limited use immunity. The issue presented below was whether the Government was required as a matter of fundamental fairness to grant such immunity so the two would be available to testify for the defense.

The District Court found the testimony of those two individuals to be, in fact, exculpatory, and granted a motion for a new trial made by Weisman's co-defendant, Leonard Horwitz, on the grounds that the Government refused to grant those individuals immunity, *United States* v. *DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979).[3] As to Weisman, the District Court found that Weisman had waived the issue because he did not expressly raise it in his post trial motion for a new trial.[4] In so ruling, the trial court totally ignored its own prior ruling that a motion by

---

[3] The Second Circuit remanded the decision of the District Court holding that the standard enunciated in *United States* v. *Turkish*, F.2d (Docket Nos. 79-1326, 79-1396, May 27, 1980) applied. On June 27, 1980 Horwitz filed a Petition for Writ of Certiorari in this Court.

[4] Because the District Court's denial of Weisman's motion for a new trial was without opinion, Weisman contended the record below was unclear as to whether the Court had dealt with this issue as it applied to him. Accordingly, after the notice of appeal was filed he moved before the District Court for clarification. That motion was denied. Weisman then moved in the Circuit Court for a remand to clarify the record, which motion was granted. Upon remand, the District Court filed an opinion (the opinion appearing as Appendix C to this petition), holding that Weisman never raised the issue.

one defendant would be applicable to all,[5] and the fact that Horwitz' lawyer had explicitly stated at the hearing on reverse immunity that Weisman joined in Horwitz' motion (Tr. 3878).

The Second Circuit Panel refused to disturb this ruling, finding that the Court's practice as to trial motions did not extend to post trial motions. The Panel also refused to invoke the plain error doctrine, on the grounds that if Weisman had been included in the District Court's reverse immunity ruling, the Government might have decided to try him separately without the evidence furnished by its immunized witnesses.

REASONS FOR GRANTING THE WRIT

1. THE INTERPRETATION OF RICO'S "PATTERN" REQUIREMENT BELOW EFFECTS A MAJOR, UNWARRANTED EXPANSION OF THAT STATUTE

The Second Circuit Panel interpreted the language of RICO prohibiting the conduct of the affairs of an enterprise "through a pattern of racketeering activity", 18 U.S.C. §1962(a), as not requiring that the predicate acts of racketeering be related to each other through any kind of common scheme, plan or motive. As construed by the Second Circuit, RICO now extends far beyond its intended target, the activities of organized professional criminals to allow imposition of onerous penalties and forfeitures on persons who commit isolated, unrelated

[5] The first trial ended in a mistrial because the jury was unable to agree on a verdict. At the first trial, the reverse immunity issue was raised by a motion to compel a grant of immunity or in the alternative to introduce the grand jury testimony of the two individuals the defendants wished to have immunized into evidence. The District Court denied that motion. The motion was renewed in the second trial as a trial motion, but inexplicably, the District Court did not deal with it until it ruled on Horwitz' Rule 33 motion.

crimes, even misdemeanors, as long as they occur within ten years. That interpretation is contrary to the intent of Congress as revealed by the legislative history and the decisions of other Circuits.

Review of the Second Circuit's ruling by this Court is critical, particularly since the federal courts have already read other elements of the racketeering crime entirely out of the statute. For example, in *United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U. S. 1039 (1977), the Second Circuit held, as have other circuits, that the RICO "enterprise" could be an illegal business, i.e., a confederation or group associated for the purpose of commiting crimes. In effect under this formulation the existence of the enterprise is demonstrated by proof of the acts of racketeering. As the Sixth Circuit pointed out in *United States* v. *Sutton,* 605 F.2d 260, 265-66 (6th Cir. 1979):

> "It requires no great insight to recognize that applying the statute in this fashion renders the 'enterprise' element of the crime wholly redundant and transforms the statute into a simple proscription against 'patterns of racketeering activity.' Under the approach reflected in these [cited] cases, every 'pattern of racketeering activity' becomes an 'enterprise' whose affairs are conducted through the 'pattern of racketeering activity.' Plainly, that is not the statute Congress has written."

Only by interpreting "pattern" to require that the two or more constituent acts be themselves related in some way would application of the statute be limited to the type of continuous, organized, aggravated criminal activity with which Congress was concerned.

The Second Circuit Panel ruled that the racketeering acts proscribed in 18 U.S.C. §1962(c) need only be

related individually to the enterprise. However, the statute, on its face, rebuts that interpretation. In §1962(a), which prohibits the use of funds "obtained through a pattern of racketeering activity" to establish or acquire an enterprise, there is no requirement that the enterprise even exist at the time the acts of racketeering are committed. Thus, as used in that section "pattern" clearly refers to the relationship between the acts of racketeering, and it is highly unlikely that Congress intended "pattern" to have one meaning for §1962(a) and another for §1962(c). See, e.g., *United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977) and cases cited therein; *United States* v. *Field,* 432 F. Supp. 55, 60 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir. 1978).

The Panel found no affirmative evidence in the legislative history from which to infer a requirement that the predicate acts themselves be related. Among other things, it found the Senate Committee Report on the Organized Crime Control Act of 1970 (S. Rep. No. 91-617, 91st Cong., 1st Sess. 158), and the citation of that report by the Act's sponsor, Senator McClellan, in *The Organized Crime Control Act (S.3) or Its Critics: Which Threatens Civil Liberties,* 46 Notre Dame Lawyer, 55, 145 (1970), to be "inconclusive" on the question. The Panel also cited the fact that the term "pattern" in 18 U.S.C. §3575, enacted simultaneously with RICO as part of the Organized Crime Control Act of 1970 expressly requires relatedness, as proof that Congress intended no such requirement under RICO.[6]

---

[6] 18 U.S.C. § 3575, the provisions of the Criminal Code dealing with "Dangerous Special Offenders" characterizes special offenders as those who, *inter alia,* commit a felony as part of a "pattern" of criminal conduct and subdivision (e) specifies that a "pattern of criminal conduct" exists when "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

The Second Circuit's view is flatly contradicted by Senator McClellan in the very authority characterized by the Court as "inconclusive":

> "Clearly, *just as in title ix,* where the concept of 'pattern' is employed, the intent of S.30 is clear, on its face and in the Senate Committee report, that *the term 'pattern' itself conveys the requirement of a relationship between various criminal acts."* 46 Notre Dame Lawyer at 154 (emphasis supplied).

Other persuasive expressions of this legislative intent are found in the Senate Committee Report and Senator McClellan's article. In the proposed Criminal Code Reform Act of 1979, Congress sought to clear up any lingering confusion as to its intent. It stated specifically that:

> "[T]he subject bill . . . contains an express requirement of a nexus between the offenses in order to establish a 'pattern'—i.e., that the acts be 'interrelated by distinguishing characteristics' and not be mere 'isolated events.' " Report of the Committee on the Judiciary, United States Senate, to Accompany S.1722 (S.Rep. No. 96-553, 96th Cong., 2nd Sess. 802.

Finally, the Second Circuit's interpretation of the RICO "pattern of racketerring" element conflicts with the Seventh Circuit's interpretation.[7] In *United States* v. *Kaye,* 556 F.2d 855 (7th Cir. 1977), *cert. denied,* 434 U.S. 921

[7] Indeed, the Second Circuit's interpretation also conflicts with prior formulations by courts in the same circuit, *United States* v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 236 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); *United States* v. *Chovanec, et al.,* 467 F. Supp. 41 (S.D.N.Y. 1979); see also, *United States* v. *Field,* 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir. 1978).

(1977) quoting *United States* v. *White,* 386 F. Supp. 882, 883 (E. D. Wis. 1974), the Court held:

> "In common usage, the term 'pattern' is applied to a combination of qualities or acts forming a consistent or characteristic arrangement. *Use of the term 'pattern' in connection with two racketeering acts committed by the same person suggests that the two must have a greater interrelationship than simply commission by a common perpetrator.* The acts alleged in count I are part of a particular continuing criminal activity . . . . Absent a showing of a 'pattern' or interrelatedness of such activity, §1962(c) could be used against the isolated acts of an independent criminal. Such was not the intended target of the challenged statute. See also *United States* v. *Campanale,* 518 F.2d 352, 363 n.32 (9th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638." (emphasis supplied)

This Court should grant certiorari to resolve this conflict.

2. THE COURT BELOW ALSO MISCONSTRUED RICO WHEN IT RULED THAT CONSPIRACY COULD BE A SEPARATE PREDICATE ACT

The Panel's ruling that conspiracy may be a predicate act under RICO even though it is not included in the listing of predicate acts in 18 U.S.C. §1961(1) is also based on a gross misreading of the legislative history which demonstrates beyond doubt that Congress decided not to include the crime of conspiracy as a separate act of racketeering. The RICO Act originated in the Senate as S.1623, 91st Cong., 1st Sess. (1969)(the "Criminal Activities Profits Act") and S.1861, 91st Cong. 1st Sess. (1969)(the "Corrupt Organizations Act of 1969"). S.1623 provided that persons who derived income from

"criminal activity" and applied that income to the acquisition of a business enterprise shall be guilty of a crime. The original bill defined "criminal activity" as follows:

> "The term 'criminal activity' means [as in the present statute the various categories of offenses and specific statutes were listed] . . . and (C) *any conspiracy to commit any of the foregoing offenses.*" (emphasis supplied)

Id., §2(1) [sic; probably §1(1)]. S.1861 created criminal sanctions based on "racketeering activity" and "pattern of racketeering activity", with the former defined as follows:

> "(1) The term 'racketeering activity' means [as in the present statute the various categories of offenses and specific statutes were listed] . . . and (C) *any conspiracy to commit any of the foregoing offenses.*" (emphasis supplied)

In the final version of the statute (§1961(1)), subdivision (C) relating to conspiracy was deleted. This plainly demonstrates Congress' intention not to make conspiracy a separate act of recketeering.

The Panel places great significance on the supposed fact that when Congress in the final draft of the legislation deleted the reference to conspiracy it retained the expansive language "punishable under any law of the United States" thereby implicitly encompassing the crime of conspiracy. But the expansive language was already in the early draft and remained there after the conspiracy section was deleted. Thus, S.1623, 91st Cong. 1st Sess. (1969), Sec. 2(1) provided:

> "The term criminal activity means (A) any act involving . . . bankruptcy fraud . . . *which is punishable under any statute of the United States*** (C) any conspiracy to commit any of the foregoing offenses."

Hence, when Congress dropped subsection (C) relating to conspiracy it unequivocally expressed an intention not to include conspiracy as a predicate act under RICO.

Serious constitutional questions arise from implying coverage for a crime not listed in a statute. See, *United States* v. *Culbert*, 435 U.S. 371, 374 (1978) quoting *Connally* v. *General Construction Co.*, 269 U.S. 835 (1926). Further, by including conspiracy as a separate predicate act the Circuit Court emasculates the requirement that there be at least two criminal acts to form a pattern. Under its present ruling, if one act yields multiple crimes, that is sufficient to form a pattern. That result is flatly at odds with Congress' specific rejection of the notion that one episode of criminal activity should constitute racketeering, and a result which mandates review by this Court.

3. THE COURT BELOW HAS COMMITTED GRAVE ERROR IN REFUSING TO SUPPRESS WEISMAN'S CONFESSION AS THE FRUIT OF AN UNCONSTITUTIONAL ARREST

The Second Circuit Panel's refusal to suppress Weisman's September 19, 1977 statement allows the Government to execute arrests not only without probable cause, but also for the deliberate purpose of extracting cooperation and hence admissions on unrelated charges. This Court should grant review to prevent this kind of flagrant misconduct by the Government.

The Panel agreed with the District Court that there was a sufficient break in the stream of events between Weisman's arrest on September 16 and his statements on September 19 to insulate those later statements and permit their admission into evidence. The Court stated (App. A-18)[8]:

[8] "App. ____" refers to the Appendix to this petition.

> "Although Weisman was never entirely free of the shadow of the illegal arrest, we believe that the facts cited by Judge Sweet were sufficient to dissipate the coercive impact of that arrest."

This is factually incorrect in that almost all of the intervening factors cited by the District Court also existed on September 16, the date of Weisman's illegal arrest and of his first statements suppressed by the Court.[9]

More importantly the Panel's determination that the District Court did not find the prosecutor acted in bad faith, so as to warrant invocation of the exclusionary rule, creates an unrealistically high threshold of culpability on the part of Government agents before the protections of the Fourth Amendment are triggered.[10] The District Court found that the prosecutor deliberately acted (1) without any probable cause, and (2) for an improper purpose (461 F. Supp. at 833-34)(App. B-16—B-17). That is sufficient bad faith to warrant his being deprived of the very fruits he sought to obtain by his illegal action, *Brown* v. *Illinois,* 422 U.S. 590 (1975); *United States* v. *Edmons,* 432 F.2d 566 (2d Cir. 1970); *United States ex rel Gockley* v. *Myers,* 450 F.2d 323 (3d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972).

---

[9] By September 19, three days had passed and Weisman had been arraigned on the bank fraud charge. However, this arraignment was not on the charge the interrogation related to, but on a different bogus charge. Weisman obviously was not advised that he would not be prosecuted for bank fraud and the arraignment could only have reinforced his belief that the bogus charge was a real one, increasing his incentive to cooperate. Weisman was also as intelligent and sophisticated on the 16th as he had been on the 19th, and had been accorded the opportunity to call a lawyer then, prior to his first statements. That factor and the others cited by the Court did not justify admission of the September 16th statements and should not be cited to justify the admission of the September 19th statements.

[10] The Panel totally altered the tenor of Judge Sweet's finding when it stated that the arrest was "partially" motivated by a desire to obtain Weisman's cooperation. Judge Sweet held that it was the "major purpose" for arresting Weisman (461 F. Supp. at 834) (App. B-17).

The result of the Panel's ruling is that when a prosecutor arrests a person without "probable cause", and attempts to extract cooperation from him on any matters under investigation, his only risk is that he will probably not be able to use the statements made by the arrested person at the first interrogation session. However, if the illegal purpose of the arrest is achieved and the person decides to cooperate then, whatever is said at the later session is admissible. We submit that this ruling, allowing a prosecutor to engage in such unacceptable conduct, calls for review by this Court.

4. THE COURT BELOW HAS COMMITTED GRAVE ERROR IN HOLDING THAT WEISMAN WAIVED HIS REVERSE IMMUNITY CLAIM

The Court of Appeals' ruling that Weisman waived his reverse immunity claim raises important questions regarding the circumstances under which a defendant may be held to have waived important substantive rights.

The District Court's unvarying rule was that a motion made by one defendant would be applicable to all. In both trials the reverse immunity question was raised in trial motions which sought trial relief. For unarticulated reasons, the District Court decided not to resolve the issue during the trial but to wait until the trial was over. Further, Weisman had every reason to assume that his post-trial motion, which renewed all motions made during the trial, thereby included the reverse immunity argument. This was certainly not a situation where the matter was not called to the Court's attention.[11] Weisman's only failing was that he did not argue in detail the manner in

[11] Horwitz' lawyer expressly stated at the post trial reverse immunity hearing that Weisman joined in the motion (Tr. 3828), and the District Court expressly recognized Horwitz' lawyer was protecting Weisman's interests (Tr. 3848).

which the reverse immunity issue applied to him.[12] To hold that he waived his objection on that basis is to regress to technical rules of motion practice.[13]

It has always been the rule that errors affecting fundamental rights in criminal cases are never waived, whether they are objected to improperly or not at all, *Wiborg* v. *United States,* 163 U.S. 632, 658 (1895); *Crawford* v. *United States,* 212 U.S. 183, 184 (1908). This Court, in the exercise of its supervisory powers over the federal courts, should intervene to protect such fundamental principles of a fair trial.

5. THE COURT BELOW ERRONEOUSLY FAILED TO ADDRESS WEISMAN'S ARGUMENT THAT THE DISTRICT COURT COMMITED SUBSTANTIAL ERRORS WITH REGARD TO THE SECURITIES FRAUD COUNTS

A. The District Court, in Its Charge To The Jury on "Principal Operator" and "Promoter", Impermissably Extended The Requirements of Disclosure Under The Securities Laws and Regulations

The Government charged that the Theatre's prospectus was false because it did not disclose that co-defendants DePalma and Fusco were principal operators and promoters. The Circuit Court did not even address Weisman's argument below that the District Court erred

---

[12] The Panel stated that Weisman was "inevitably in a somewhat different evidentiary posture than Horwitz" (App. A.-21). Weisman, of course, was in precisely the same position as Horwitz with regard to the charge in question; neither was charged in a more extensive or different way from the other.

[13] In addition, for the Panel to embrace the Government's claim that "it might have decided to try Weisman separately" had he raised the reverse immunity claim is, respectfully, incomprehensible. It was after the second trial was over, in his post trial motions for a new trial, that the Panel says Weisman should have expressly raised his reverse immunity claim.

in allowing the jury to apply as each juror "understand[s] them" the term "promoter", a term of art carefully defined in SEC regulations, Rule 405, 17 C.F.R. §230.405, and the term "principal operator", a term not even mentioned in the securities laws.

Congress provided an extraordinarily detailed statutory elaboration of the disclosures required in a prospectus covering publicly offered securities, meticulously defining both the circumstances when disclosure about management and persons even indirectly connected with an issuer is required, as well as the contents of that disclosure.[14] The District Court, however, simply ignored this extensive framework and instructed the jurors that "principal operator is not defined in the securities law" (Tr. 4741-42). With respect to promoter, the jury was also told they were not obligated to follow or make the findings contemplated by the applicable SEC regulations.

As a result of this charge, the jury was permitted to find that the Theatre's prospectus was false on the basis of evidence which, under the securities laws, would not warrant a finding that DePalma and Fusco were either executives or performed similar policy making functions requiring their disclosure in a prospectus.[15]

---

[14] Securities Act of 1933, §7, 15 U.S.C. §77f, Schedule A ¶(4)-(7), 15 U.S.C. §77aa and Regulation C, particularly Rules 405 and 410 promulgated thereunder, 17 C.F.R. §230.405 and §230.410, Standard Instructions For Filing Forms Under the Securities Act of 1933, 17 C.F.R. §229.1, *et seq.*

[15] The jury for example, may have found DePalma and Fusco to be "principal operators of the Theatre", not because of proof they performed the role of its executives but because of proof they actively participated in entities which had direct dealings with the Theatre such as the company operating the parking concession for the Theatre's customers or the company which provided fill for the Theatre's construction site. There was never a suggestion that those relationships were "material" in any way, and such proof alone could never warrant a finding that these men were either executives of the Theatre or performed similar policy making functions requiring their disclosure in a prospectus. See 17 C.F.R. §230.405, 229.20, Items 3(b) and (c).

This Court should grant review because conviction on the basis of the District Court's charge effectively expands disclosure requirements beyond those specifically required by the applicable statutes and regulations.

B. The District Court's Admission of Bodywires Worn by the Government's Informant Violated Weisman's Sixth Amendment Right to Counsel

As proof on the securities fraud charges against Weisman, the Government introduced at trial numerous secretly recorded conversations between Weisman and Norman Brodsky ("Brodsky"), a Government informant. Having failed to gain Weisman's continuous cooperation through its use of a sham arrest in September, 1977 (see Point 3, *supra),* the Government used Brodsky to surreptitiously interview Weisman on matters concerning the Theatre. These conversations took place during the period after Weisman's arrest when unquestionably the accusatory process against Weisman had begun.[16] The Court below failed to address Weisman's argument that admission of those bodywires violated his Sixth Amendment right to counsel.

This Court recently confirmed, based on *Massiah* v. *United States,* 377 U.S. 201 (1964), that the Government may not constitutionally use undercover agents to deliberately elicit incriminating statements from an accused, *United States* v. *Henry,* No. 79-121 (U.S. Sup. Ct. June 16, 1980). In this case, as in *Henry,* the Government intentionally created a situation to induce Weisman to make incriminating statements without the assistance of counsel.

---

[16] There exists a real question on the record as to whether the complaint against Weisman on the bank fraud charge had yet been dismissed. It was not until July 10, 1978 that an entry was made in the clerk's office purporting to show a dismissal of the indictment on Sunday, October 2, 1977 (Tr. 751-54).

While Weisman had not been indicted on charges relating to the Theatre at the time he spoke to Brodsky, he had been arrested on charges fabricated by the Government to induce his cooperation in the Theatre investigation. The Government cannot have it both ways. It should not be permitted to justify its efforts to obtain Weisman's cooperation by having him arrested on a different charge, and then disregard that arrest and employ investigatory techniques properly employed only before formal accusations are made.

As a consequence of the pretext arrest the accusatorial process had begun and the focus was on Weisman with respect to the Theatre. The Government knew he had retained counsel and declined further interviews with the Government. Under these circumstances, the Court below should have held the Brodsky bodywires to be inadmissable.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

July 10, 1980

Respectfully submitted,

NORMAN S. OSTROW
FRANK H. WRIGHT
MARGARET SHAW
GRAND & OSTROW
Attorneys for Petitioner
375 Park Avenue
New York, N.Y. 10152
212-832-3611

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 642-3—September Term, 1979

(Argued January 23, 1980 Decided April 4, 1980)

Docket Nos. 79-1315, 79-1318

UNITED STATES OF AMERICA,

Appellee,

—against—

ELIOT H. WEISMAN and SALVATORE J. CANNATELLA,

Defendants-Appellants.

Before:

SMITH,* FEINBERG, *Circuit Judges,*
and OWEN, *District Judge.***

---

* Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Judges Feinberg and Owen, who are in agreement on this opinion. Judge Smith, who heard the argument, unfortunately died on February 16, 1980. Prior to his death, Judge Smith voted to affirm and was in agreement with his colleagues on all issues in the case. He did not have the opportunity, however, to see this opinion prior to his death.

** Honorable Richard Owen, District Judge of the Southern District of New York, sitting by designation.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a jury trial before Judge Robert W. Sweet for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961 et seq., and related offenses.

Affirmed.

FRANK H. WRIGHT, New York, NY (Grand & Ostrow, New York, NY, Norman S. Ostrow, Leslie A. Conason, of Counsel), *for Defendant-Appellant Weisman.*

DOUGLAS F. EATON, New York, NY, *for Defendant-Appellant Cannatella.*

NATHANIEL H. AKERMAN, Assistant United States Attorney, New York, NY (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Scott G. Campbell, Howard W. Goldstein, Assistant United States Attorneys, of Counsel), *for Appellee.*

FEINBERG, *Circuit Judge:*

Eliot H. Weisman and Salvatore J. Cannatella appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after an eight-week jury trial before Judge Robert W. Sweet. Weisman, Cannatella and eight other co-defendants were indicted in June 1978 for alleged criminal offenses arising out of the crea-

tion, operation and bankruptcy of the Westchester Premier Theatre (the Theatre) in Tarrytown, New York. Weisman was convicted of one count of operating the Theatre through a pattern of racketeering activity in violation of 18 U.S.C. §§1962(c) and 2, nine counts of fraud in the sale of securities in violation of 15 U.S.C. §§77q(a) and 77(x) and 18 U.S.C. §2, nine counts of bankruptcy fraud in violation of 18 U.S.C. §§152 and 2, one count each of conspiracy to commit securities fraud and bankruptcy fraud in violation of 18 U.S.C. §371, and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. §§ 1503 and 2. Cannatella was convicted of the same counts of bankruptcy fraud and conspiracy to commit bankruptcy fraud.[1] In this appeal, Weisman and Cannatella raise numerous challenges to the conduct of the trial and the verdict, the most significant of which relate to Weisman's conviction under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. For reasons set forth below, we affirm the judgments of conviction.

I. The Facts

Appellant Weisman does not argue that the evidence at trial was insufficient to convict him; while appellant Cannatella does make such a claim, it is without merit as will be seen below in Part III B of this opinion. The following is a brief summary of the charges in the

---

1 Defendant Weisman was sentenced to multiple concurrent sentences, resulting in a six and one-half year prison term, three years probation following expiration of the prison term, and $15,000 in fines. Defendant Cannatella also received multiple concurrent sentences, resulting in one-year prison term, to be followed by three years probation.

government's indictment, which were subsequently shown to be justified by the evidence at trial and by guilty pleas of various defendants. The Theatre, from its inception until its collapse, was operated through a wide ranging pattern of fraud. This pattern emerged in 1973, when Weisman, along with his partners and eventual co-defendants Gregory J. DePalma and Richard Fusco, sought through a fraudulent public offering of common stock to raise over two million dollars for construction of the Theatre. Weisman and his co-defendants filed with the Securities and Exchange Commission a prospectus that contained false and misleading statements and that failed to disclose material facts, including DePalma's and Fusco's role in the project and their beneficial ownership of a large portion of the Theatre's stock. Also, to insure purchase of the necessary minimum number of shares at the public offering, Weisman, DePalma and Fusco, with the assistance of co-defendants Murad Nersesian, Leonard Horwitz and Laurence I. Goodman, made secret arrangements through which various individuals agreed to purchase stock in the Theatre in return for promises of eventual cash payoffs, transfers of portions of Weisman's interest in the Theatre, and other forms of inducement or remuneration.

Due to these efforts, the public offering of the Theatre's stock was successful. The newly constructed Theatre opened in March 1975, at which time Weisman and his confederates systematically began to skim and convert to their own use moneys received by the Theatre from ticket sales and various concessions. Portions of these funds were also used to repay the various secret debts incurred prior to the stock offering. During this period, the Theatre received a substantial

amount in loans from Hugh Johnson & Company. These loans were arranged by the company's president, appellant Cannatella, who assumed a management role in the Theatre along with Weisman, DePalma and Fusco.

The skimming operation forced the Theatre in December 1976 to file a petition under Chapter XI of the Bankruptcy Act. The Theatre was adjudged a "debtor in possession" and allowed to continue operations, but all expenditures, other than salaries and operating expenses, were subject to prior approval by the bankruptcy court. Nonetheless, Weisman, DePalma and Fusco, now joined by Cannatella, continued secretly to skim the Theatre's receipts. Portions of the diverted revenues were unlawfully paid to various co-defendants, including Thomas Marson and Anthony Gaggi.

In May 1977, a federal grand jury began investigating the operations of the Theatre. At this time, Weisman and Horwitz attempted to persuade various prospective grand jury witnesses not to disclose the defendants' fraudulent transactions. These efforts to sidetrack the grand jury were unavailing, however, and a multiple count indictment was returned in June 1978.

Trial commenced in October 1978 as to nine defendants; Marson's trial was severed for health reasons. In December 1978, Judge Sweet granted Gaggi's motion for acquittal, and in January 1979, declared a mistrial as to the remaining defendants when the jury was unable to reach a verdict. Subsequently, defendants Fusco, DePalma and Marson pled guilty to various charges. The new trial for defendants Weisman, Cannatella, Nersesian and Horwitz began in March 1979. As in the first trial, the bulk of the government's case

consisted of testimony of several participants in the various schemes and numerous tape recordings obtained by the government through electronic surveillance and by a body recorder worn by government informant Norman Brodsky. In May 1979, the jury acquitted Nersesian but found Weisman, Horwitz and Cannatella guilty on all counts. Judge Sweet subsequently granted Horwitz's motion for a new trial, but denied similar motions by Weisman and Cannatella. On this appeal, we treat the major arguments raised by Weisman and Cannatella in separate sections. Our reviewing task is made easier by the various thorough opinions of the district judge, to which we refer below.

II. Weisman

A. *The RICO Count.*

Weisman directs his most pointed attack against his conviction for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq., commonly known as RICO. For convenience, we have reproduced the relevant sections of RICO as Appendix A. The RICO count charged that Weisman, along with DePalma and Fusco, violated § 1962(c) by conducting the affairs of the Theatre through a "pattern of racketeering activity" that included the various predicate acts of securities fraud and bankruptcy fraud alleged elsewhere in the indictment. Weisman contends that his conviction on this count was invalid in three respects.

Weisman first argues that Judge Sweet's charge on the relationship between the various predicate acts of racketeering necessary to establish a violation of section 1962(c) was incorrect. That section prohibits the

operation of any "enterprise" engaged in interstate or foreign commerce through a "pattern of racketeering activity." A "pattern of racketeering activity" is defined by section 1961(5) to require the commission of at least two "acts of racketeering" within a ten-year period, and section 1961(1)(D) specifies both fraud in the sale of securities and bankruptcy fraud as acts of racketeering. Weisman, however, unsuccessfully requested that the jury be charged that even if it found that he had committed two or more predicate acts of racketeering with a ten-year period, an unlawful "pattern of racketeering activity" would not be established unless the predicate acts were also found to be "related" to each other through a "common scheme, plan or motive so as to constitute a pattern of activity."

Weisman renews this claim on appeal, arguing that a requirement of "relatedness" between predicate acts is implicit in the meaning of the word "pattern" and should have been explained further, as he requested. Appellant further argues that such an interpretation is necessary in order to prevent the application of RICO to instances of sporadic and unrelated criminal activity that Congress clearly did not intend the statute to cover.[2] Finally, appellant relies heavily on the analysis of the district court in United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), aff'd on other grounds, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). In *Stofsky*, the court noted that the language of RICO did not embody any express requirement of rela-

---

2 For example, appellant suggests that absent a requirement of relatedness, a RICO prosecution could be brought against the owner of a "Mom and Pop" grocery who bribed a local official to obtain a zoning variance, enabling the owner to build a store, and who ten years later filed a false report with the bankruptcy court when the store failed.

tedness between predicate acts. The court nonetheless concluded, as appellant argues here, that the word "pattern" should be construed to require that the predicate acts of racketeering be "connected with each other by some common scheme, plan or motive" in order to prevent the application of the statute to isolated and sporadic criminal acts. 409 F. Supp. at 614. The court found further support for its interpretation of "pattern" in the language of 18 U.S.C. § 3575, the provision of the criminal code dealing with "Dangerous Special Offenders." Section 3575 characterizes as "special offenders" those who, inter alia, commit a felony as part of a "pattern" of criminal conduct, and subsection (e) specifies that a "pattern of criminal conduct" exists when "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Since RICO and section 3575 were both enacted as part of the Organized Crime Control Act of 1970, the *Stofsky* court concluded that the interpretation of the word pattern under both provisions should be similar.

While these arguments are far from frivolous, we affirm Judge Sweet's refusal to give the requested charge, substantially for the reasons set forth in his ruling on appellant's challenge to the indictment before the first trial, which raised the same arguments. United States v. DePalma, 461 F. Supp. 778, 781-85 (S.D.N.Y. 1978). As noted in *Stofsky*, supra, the statutory language does not expressly require that the predicate acts of racketeering be specifically "related" to each other and we find no affirmative evidence in the legislative history from which we should infer such a

requirement.[3] Furthermore, the broad spectrum of predicate acts of racketeering enumerated in section 1961(1) belies any intent on the part of Congress to require that such predicate acts of racketeering must possess a unitary character. While we agree with appellant Weisman that RICO was not intended to apply to sporadic and unrelated criminal acts, see S. Rep. No. 91-617, 91st Cong., 1st Sess., pp. 122, 158 (1970), we find that the statute was generally designed to avoid such an application. Most importantly, the predicate acts constituting a "pattern of racketeering activity" must all be done in the conduct of the affairs of an "enterprise." 18 U.S.C. § 1962(c). Thus, the enterprise itself supplies a significant unifying link between the various predicate acts specified in section 1961(1) that may constitute a "pattern of racketeering activity." See United States v. Elliott, 571 F.2d 880, 899 & n.23 (5th Cir. 1978). In addition, the statute requires that the predicate acts be temporally related in that they must occur within a ten-year period. Moreover, we do not believe that the extensive definition of pattern in section 3575 requires a district court to give a parallel charge concerning the meaning of "pattern" under

---

3 Appellant relies heavily on a statement in a Senate report dealing with RICO which states that the "factor of continuity plus relationship . . . combines to produce a pattern." S. Rep. No. 91-617, 91st Cong., 1st Sess. 158. See also McClellan, The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties, 46 Notre Dame Lawyer 55, 144 (1970). The government, however, responds by citing other portions of the legislative history, including the same Senate report relied on by appellant, that fail to indicate any requirement of relatedness between predicate acts. We, however, find the authority cited by both sides for their interpretation of "pattern" to be at best inconclusive. For example, the reference to a "relationship" in the Senate report relied on by appellant fails to disclose whether the relationship must be between the predicate acts themselves, or, as we believe, between each predicate act and the conduct of the affairs of an enterprise.

RICO. Indeed, the fact that the two sections were enacted simultaneously yet embody different definitions of "pattern" would seem to indicate that Congress intentionally chose to use the term differently in different contexts.

It may well be, as appellant argues, that the statutory requirements that predicate acts of racketeering must occur in the conduct of a single enterprise within a ten-year period in order to constitute a "pattern of racketeering activity" are by themselves inadequate to bar some hypothetical prosecutions under RICO that are clearly beyond the intended scope of the statute. See note 2 supra. In United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, 48 U.S.L.W. 3602 (March 18, 1980), we noted that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended" and we went on to caution strongly against "undue prosecutorial zeal in invoking RICO." Id. at 395-96. We reiterate this warning, but are content to rule on actual, as opposed to hypothetical, applications of the statute, and we find that the RICO indictment in the present case was clearly appropriate. The evidence in the record reveals that the affairs of the Theatre, from its inception until its eventual collapse and bankruptcy, were conducted through a variety of racketeering activities enumerated in the indictment. Indeed, a more appropriate application of the statute would be difficult to imagine.[4] Ac-

---

4 Furthermore, even if we were to conclude that the predicate acts themselves must be related in order to demonstrate a "pattern of racketeering," we would find that the predicate acts of racketeering were closely related. Weisman was a perpetrator of all of the acts of fraud and all were undertaken during the conduct of the Theatre's affairs. Furthermore, the acts of stock fraud harmed legitimate

cordingly, we find no error in the court's refusal to adopt Weisman's extended definition of "pattern" in charging the jury.

Weisman also objects to the RICO conviction on the ground that the district court incorrectly charged the jury that the two conspiracy counts alleged in the indictment could constitute the predicate acts of racketeering necessary to establish a "pattern of racketeering activity" under section 1962(c). In support, appellant notes that violations of 18 U.S.C. § 371, the conspiracy statute, are not listed as predicate acts of racketeering under section 1961. Appellant also infers a specific congressional intent to exclude conspiracy as a predicate act from the fact that original versions of the bill that ultimately became RICO did include conspiracy as a predicate act, but the statute as enacted did not. Finally, appellant suggests that the inclusion of conspiracy as a predicate act would again raise the specter of an unintended hypothetical application of RICO; specifically, appellant argues that commission of a single substantive offense enumerated in section 1961 could nonetheless result in a RICO violation if conspiracy to commit that offense were also charged as a predicate act of racketeering. Such a prosecution, appellant contends, would be directly con-

---

investors in the Theatre and many of these same investors were again harmed when the later acts of bankruptcy fraud prevented the Theatre's financial rehabilitation. The acts of fraud were also all directed toward the same goal of enriching Weisman and his confederates at the expense of the Theatre and through the device of the Theatre. Finally, the methods of committing the acts of securities fraud were similar, as were the methods used in the acts of bankruptcy fraud. In light of the numerous similarities between the predicate acts of racketeering, we find appellant's contention that a jury could find that the acts of racketeering activity he engaged in were sporadic and unrelated to be completely untenable.

trary to Congress's intent to restrict the application of RICO to situations in which two or more separate predicate acts of racketeering are committed.

While these arguments are not without force, we think that conspiracy can properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in section 1961(1)(D). That provision states that "'[r]acketeering activity' means . . . *any offense involving* bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, *punishable under any law of the United States* . . . ." (Emphasis supplied). This language is certainly broad enough on its face to include conspiracies involving securities and bankruptcy fraud and drug related offenses. The deletion of conspiracy from earlier drafts of RICO does not undermine this conclusion. In those drafts, the conspiracies chargeable as predicate acts could relate to a broad number of offenses now listed in subsections (A) to (C) of section 1961. While this specific reference to conspiracy was deleted from the final version of RICO, the expansive language quoted above was retained in a separate section—section 1961(1)(D). Thus, the alterations of section 1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D). This conclusion is bolstered by the fact that subsections (B) and (C), which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.

Finally, the present indictment is not rendered invalid simply because some hypothetical prosecutions under the statute as presently interpreted would fall beyond the pale of intended application.

Even if our conclusion that the two conspiracy counts could be charged as predicate acts of racketeering is incorrect, Weisman's conviction under the RICO count is nonetheless valid. In addition to convicting Weisman on the conspiracy counts, the jury also found him guilty of nine counts of bankruptcy fraud, all of which were also charged as predicate acts of racketeering under the RICO count, and nine counts of fraud in the sale of securities, which the district court also charged could constitute a single predicate act of racketeering under the RICO count.[5] Thus, even excluding the conspiracy counts as predicate acts, the convictions for securities fraud and bankruptcy fraud could also constitute ten separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count. This assumes, of course, that the jury also found that these substantive offenses occurred in the conduct of an "enterprise" engaged in interstate or foreign commerce, as required by section 1962(c). While in some situations it may be doubtful that this assumption is established as a matter of law, in the present case the jury could not have rationally concluded that the conspiracies to commit bankruptcy and securities fraud occurred in the conduct of the Theatre's affairs without also finding

---

5 The district court concluded that the specific violations of securities laws charged elsewhere in the indictment could only constitute a single predicate act of racketeering because they arose "out of the same episode." The substantive counts of bankruptcy fraud, in contrast, were charged as separate predicate acts of racketeering activity because they were distinct episodes.

that the substantive offenses carried out in the course of the conspiracies also took place in the conduct of the Theatre's affairs. Thus, even if the conspiracy counts were excluded, the jury verdict conclusively established a RICO violation and therefore any error in the inclusion of these counts in the RICO charge was harmless. For this reason, the decision in United States v. Brown, 583 F.2d 659, 669 (3d Cir. 1978), cert. denied, 99 S.Ct. 1217 (1979), heavily relied upon by appellant, is distinguishable. In *Brown*, where there was no conspiracy charge, the jury found defendant guilty of four substantive counts and also of a RICO count in which the four counts were charged as predicate acts of racketeering. The Third Circuit reversed the convictions on two of the substantive counts for insufficient evidence. However, unlike the present case in which the conspiracy counts covered the substantive offenses charged as predicate acts, in *Brown* the substantive offenses charged as predicate acts were distinct and hence it was arguably impossible to determine from the verdict which offenses the jury relied upon in finding a pattern of racketeering. Accordingly, the Third Circuit also invalidated the RICO conviction. But see United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Finally, appellant attacks the RICO conviction because the judge charged that the securities fraud counts could be a predicate act of racketeering. Weisman argues that because the Theatre was not constructed and in operation until 1975, it was not an "enterprise" in 1973 when the acts of securities fraud took place. Consequently, the argument goes, securities fraud could not constitute a predicate act of racketeering through which Weisman "conducted the af-

fairs of an enterprise," within the meaning of section 1962(c). We reject this view as an overly restrictive interpretation on these facts of the meaning of enterprise within the context of that section. While that provision is apparently inapplicable to acts of racketeering occurring before the creation or acquisition of an enterprise,[6] we believe that there was sufficient evidence to allow the jury to conclude that an enterprise was in existence well before the acts of securities fraud in 1973. For example, after its incorporation in 1971, the Theatre adopted bylaws, secured counsel and hired employees, established offices, sought a construction loan, entered negotiations with a real estate firm for a construction site, and began entering performance contracts with various entertainers. The procurement of additional funds through the 1973 public offering was thus simply another, admittedly crucial, part of the Theatre's continuing affairs, and the jury could therefore conclude that the fraud that occurred in connection with the public ofering constituted an act of racketeering activity undertaken in the conduct of the Theatre's affairs.

B. *The Confession.*

Weisman also argues that the district court erred in not suppressing certain statements he made to the government on September 19, 1977. Weisman had been arrested three days before pursuant to a warrant issued against him and his wife for allegedly making false statements on a bank loan application in violation of 18 U.S.C. §1014, a charge unrelated to the present indictment. Weisman was advised of his *Miranda*

---

6 Cf. 18 U.S.C. §§1962(a) and (b).

rights and, after signing a waiver of rights form, was questioned by Assistant United States Attorney Nathaniel Akerman. The focus of the interrogation, however, soon shifted from the alleged bank loan fraud to possible criminal activities engaged in by Weisman in connection with the Theatre's operations. Akerman outlined the already substantial evidence against Weisman and suggested that he faced a twenty-year prison term for racketeering. Weisman was informed that if he cooperated in the grand jury's ongoing investigation of the Theatre's operations, the fact of his cooperation would be brought to the attention of the judge. Apparently as a further incentive, the government declined to execute the arrest warrant for Weisman's wife on the bank loan fraud charges. Weisman agreed to cooperate; after answering questions for several hours, he was released on his own recognizance.

The following day, Weisman was formally arraigned before United States District Judge Knapp on the bank loan fraud charges and, with the government's consent, was again released from custody. Two days later, on September 19, 1977, Weisman again met with Akerman and several government agents. After being advised of his rights and signing a second waiver form, Weisman continued to answer questions concerning the operation of the Theatre. On October 2, 1977, the complaint against the Weismans concerning the fraudulent bank loan application was dismissed on the government's motion. Weisman, however, subsequently declined to cooperate further in the Theatre investigation.

Prior to trial on the present indictment, Weisman moved to suppress his statements of September 16 and 19 as the products of an illegal arrest. Judge Sweet

ruled that the arrest had been improper because of lack of probable cause and because it was partially motivated by a desire to obtain Weisman's cooperation in the grand jury investigation of the Theatre. Accordingly, the judge suppressed Weisman's statements of September 16. The court nonetheless declined to suppress the September 19 statements, concluding the intervening circumstances had sufficiently dissipated the taint of the original arrest. See United States v. DePalma, 461 F. Supp. 800, 831-35 (S.D.N.Y. 1978).

Weisman now contends that the failure to suppress the September 19 statements was erroneous under the Supreme Court's controlling decision in Brown v. Illinois, 422 U.S. 590 (1974). In *Brown*, the Court noted that statements obtained after an illegal arrest need not be excluded at trial if the causal connection between the arrest and the statements was broken. The Court specifically noted that the administration of *Miranda* warnings, the temporal proximity of the arrest and the statements, the presence of "intervening circumstances," and the "purpose and flagrancy of the official misconduct" were all factors relevant to a determination of whether the statements were obtained through exploitation of an illegal arrest. Id. at 603-04. In the present case, Judge Sweet assessed Weisman's September 19 statements in light of the *Brown* criteria and concluded that they were the result of a "voluntary and informed decision by Weisman to cooperate with the government" rather than the direct fruit of the September 16 illegal arrest. *DePalma*, supra, 461 F. Supp. at 835. Specifically, the court noted the three-day lapse between statements, the formal arraignment of Weisman before Judge Knapp, the release of Weisman on his own recognizance and the accompanying

opportunity to consult with counsel, the general lack of governmental intimidation, and Weisman's informed waiver of his rights prior to the September 19, 1979 discussions. The judge concluded that these created a "sufficient break in the stream of events to insulate the later statements." Id.

We agree with this analysis. Although Weisman was never entirely free of the shadow of the illegal arrest, we believe that the facts cited by Judge Sweet were sufficient to dissipate the coercive impact of that arrest. Nor do we find the government's misconduct so flagrant as to require a prophylactic invocation of the exclusionary rule. Although the arrest was held to lack probable cause and was designed, at least in part, to obtain Weisman's cooperation in the Theatre investigation, the district court did not find the government's action to have been in bad faith or without any evidentiary justification. In the absence of such indications of government misconduct, we have held that the exclusionary rule need not automatically be invoked if the taint of the original arrest had been purged by intervening circumstances. See United States ex rel. Pella v. Reid, 527 F.2d 380, 382-83 (2d Cir. 1975). Accordingly, we find that Weisman's September 19 statements were admissible.

C. *The Reverse Immunity Claim.*

Weisman also argues that his convictions on the securities fraud and obstruction of justice counts should be reversed because of the government's improper refusal to grant use immunity to two defense witnesses who allegedly would have exculpated him. In so arguing, Weisman seeks to take advantage of a favorable ruling by Judge Sweet on a similar claim raised by

Weisman's co-defendant, Leonard Horwitz. Following his conviction, Horwitz moved for a new trial, arguing that he had been denied due process by the government's refusal to grant use immunity to two of his witnesses, who themselves were under a continuing government investigation for their role in the Theatre's affairs and who were therefore unwilling to testify unless immunized. Judge Sweet granted the motion for a new trial at which, he indicated, the testimony of the government's immunized witnesses would be suppressed if Horwitz's witnesses were not similarly immunized.[7]

Weisman now argues that Judge Sweet's ruling on Horwitz's motion for a new trial should be extended to him since the same transactions and testimony are supposedly involved. However, we find it unnecessary to determine whether Weisman falls within the ambit of Judge Sweet's ruling, or to assess the validity of the ruling itself, since we conclude that Weisman waived any such claim by failing to raise it properly in the district court. Although the issue of reverse immunity was raised by Horwitz in both trials and in his post-conviction motion for a new trial, Weisman never moved during either trial to immunize any potential defense witnesses and never sought post-conviction relief from the district court on this ground. However, after he had filed a notice of appeal from his conviction and after the district court had ruled favorably on Horwitz's motion for a new trial, Weisman by motion requested the district court to clarify the record to indicate that he too had raised the reverse immunity

---

7 The government appealed from that ruling; the appeal was argued before this panel on the same day as the instant appeal and is now sub judice.

claim. The court denied the motion, and Weisman subsequently sought and obtained an order from this court remanding the case to the district court for the limited purpose of determining whether Weisman had raised the reverse immunity issue on the record.

In an opinion dated November 26, 1979, Judge Sweet concluded that "Weisman failed to properly raise the issue of reverse immunity prior to the time of appeal." The court acknowledged that during both trials a motion made by one defendant was deemed to be adopted by all defendants. Judge Sweet, however, went on to note that this practice was employed primarily on "evidentiary objections" and did not extend to post-trial proceedings. Hence, Horwitz's request for immunity for his witnesses during trial and his post-conviction motion for a new trial on this ground did not raise a similar claim on behalf of Weisman. In addition, the district court noted that because Weisman was in a "somewhat different evidentiary position" with respect to the securities fraud and obstruction of justice counts, "it would have been incumbent upon [him] . . . to address the proof as it applied to him in order to advance the same claim of deprivation of constitutional right."

We see no reason to disturb this ruling. The district court's practice of treating motions made by one defendant during trial as covering all defendants cannot logically be extended to particularized requests after trial by a single defendant that do not relate to the group of defendants as a whole. Horwitz's demand for use immunity for his witnesses constituted such a particularized request, since it derived from the nature of the government's evidence against *him* and the potential availability of evidence exculpating *him*. As the

district court noted, Weisman was inevitably in a somewhat different evidentiary posture than Horwitz, and hence the burden was properly upon him to show why he would be denied due process if his witnesses were not immunized. Indeed, a contrary rule would force the district judge to determine on his own initiative and without assistance which particularized requests of one defendant should be extended to other co-defendants. Alternatively, Weisman asks us to overlook his failure to press the point below and to invoke the plain error doctrine. The government, however, strongly asserts that there was no error in the district court's failure to immunize Weisman's witnesses and that even if the failure to order use immunity was erroneous, this is a "particularly inappropriate" case "to notice an error not objected to below." See United States v. Calfon, 607 F.2d 29, 31 (2d Cir. 1979). The government asserts that if the argument had been made to Judge Sweet and if he had held that his reverse immunity ruling should apply to Weisman, the government might have decided to try Weisman separately, without the evidence furnished by its immunized witnesses. It is true that the government's evidence against Weisman on the other aspects of the stock fraud not involving Horwitz's transactions was very strong; consequently, it is not an implausible claim that the government might have altered its trial strategy in the face of a timely reverse immunity request by Weisman. Under all the circumstances, we reject the invitation to find plain error. Thus, because Weisman never asserted or argued in a timely fashion that Horwitz's reverse immunity claim applied to him, we affirm Judge Sweet's holding that Weisman waived the claim. See U.S. v. Indiviglio, 352 F.2d 276, 280 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966).

D. *Tape Recorded Evidence.*

As previously noted, a substantial portion of the government's evidence against Weisman consisted of tape-recorded conversations obtained through court-ordered electronic surveillance and the body recorder worn by government informant Brodsky. At trial, Weisman requested the district court, pursuant to Federal Rule of Evidence 106, to compel the government to play in their entirety tapes, portions of which the government intended to use. Weisman also sought to admit into evidence, pursuant to Rules 803(24) and 804(b)(5), tape recordings that the government did not intend to use at trial.

The district judge denied both requests. He concluded that Rule 106 did not require the government to play tapes in their entirety if the omitted portions were not "necessary to clarify, or make not misleading, that which is introduced."[8] Subsequently, the district court ruled on numerous specific applications under Rule 106, granting some and denying some. Judge Sweet also concluded that those tapes not played by the government should not be admitted under Rules 803(24) and 804(b)(5), the residual exceptions to the hearsay rule.[9] The court reasoned that the recordings

---

8 Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

9 Rule 803(24) provides in relevent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .

failed to satisfy the requirements of the Rules, since the recordings did not embody the necessary "circumstantial guarantees of trustworthiness" and were not "more probative" than other evidence that could be procured by Weisman, including his own testimony. We find the district court's ruling on both evidentiary issues to be well within the discretion necessarily exer-

---

(24) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

10 Rule 804(b)(5) provides in relevant part:

. . . .

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

cised by a trial judge, and see no reason to elaborate further on the analysis set forth in the judge's memorandum opinion, dated November 21, 1978.

III. *Cannatella*

A. *Joinder and Severance Claims.*

On appeal, Cannatella argues that the bankruptcy fraud charges against him were improperly joined under Federal Rule of Criminal Procedure 8(b) with the securities fraud counts charged in the indictment against the other defendants. However, we find that the joinder was proper, substantially for the reasons set forth by Judge Sweet. United States v. DePalma, 461 F. Supp. 778, 787-90 (S.D.N.Y. 1978).

Rule 8(b) permits the joint trial of defendants who are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This requirement is met by the RICO count of the indictment. As previously noted, the jury could properly find that Weisman engaged in a "pattern of racketeering activity" that included, but was not limited to, the predicate acts of bankruptcy fraud with which Cannatella was charged. If, as we have already concluded, the acts of bankruptcy fraud could properly be considered part of a "pattern of racketeering activity," we see no reason why they could not similarly constitute part of a "series of acts or transactions constituting an offense" within the meaning of Rule 8(b). Indeed, a construction of Rule 8(b) that required a closer relationship between transactions than that necessary to establish a "pattern

of racketeering activity" under RICO might possibly prohibit joinder in circumstances where Congress clearly envisioned a single trial.

While we conclude that the RICO count alleges a sufficient nexus between the counts of securities fraud and bankruptcy fraud to establish that they were part of the "same series of acts or transactions," appellant Cannatella is in a somewhat unusual position because he was not indicted on the unifying RICO count, but was instead only charged with the various counts of bankruptcy fraud. However, this does not affect the propriety of joinder under Rule 8(b). The Rule specifically provides that "all of the defendants need not be charged in each count" and this language has generally been construed to permit joinder in cases where individual defendants are charged with some but not all counts of the indictment. See, e.g., United States v. Wofford, 562 F.2d 582, 585 (8th Cir. 1977), cert. denied, 435 U.S. 916 (1978); United States v. Scott, 413 F.2d 932, 934-35 (7th Cir. 1969); Haggard v. United States, 369 F.2d 968, 973-75 (8th Cir. 1966). Thus, Cannatella's indictment for the various counts of bankruptcy fraud, which also were properly charged as predicate acts of racketeering under the unifying RICO count, made joinder under Rule 8(b) appropriate.

Cannatella responds, however, that even if the bankruptcy fraud and securities fraud claims were properly joined under Rule 8(b), he was nonetheless entitled to a severance of trial pursuant to Federal Rule of Criminal Procedure 14. Admittedly, Cannatella entered only during the Theatre's closing scenes, and for several reasons would understandably prefer to have been tried separately from Weisman and the remaining co-

defendants. Weisman's criminal activities extended far beyond those of Cannatella, and it was only during that portion of the trial dealing with the securities fraud charges that the peripheral association of reputed mobster Carlo Gambino with the Theatre, as well as the prior criminal records of DePalma and Fusco, came to light.

Thus, Cannatella was concerned over possible evidentiary spillover from portions of the trial unrelated to the bankruptcy fraud counts, and may conceivably have had a better chance of acquittal had his motion for severance been granted. Nonetheless, the decision to grant or deny a severance pursuant to Rule 14 is within the broad discretion of the trial court and will not be overturned on appeal absent some showing that the defendant suffered substantial prejudice due to the joint trial. See United States v. Ochs, 595 F.2d 1247, 1260 (2d Cir.), cert. denied, 48 U.S.L.W. 3323 (1979). In the instant case, consideration of judicial economy weighed heavily in favor of a single trial, and we find no countervailing indications of actual prejudice to Cannatella that would mandate a severance. Before trial, the district judge carefully questioned prospective jurors concerning their knowledge of Gambino and excused those whose impartiality was in doubt. Furthermore, during the trial Judge Sweet repeatedly admonished the jury to evaluate the offenses charged and the evidence presented against each defendant separately, and the acquittal on all counts of co-defendant Nersesian, who was charged with stock fraud violations, indicates that the jury was able to do so. The danger of evidentiary spillover was further diminished by the fact, implicit in Cannatella's challenge to joinder under Rule 8(b), that there was little overlap at trial

between the evidence pertaining to the securities fraud counts and that concerning the bankruptcy fraud counts. Accordingly, we find no error in the refusal to sever.

B. *Sufficiency of the Evidence.*

Appellant Cannatella also challenges the sufficiency of the evidence on two grounds. Appellant first contends that under this court's decision in United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), there was insufficient non-hearsay evidence of Cannatella's involvement in the alleged bankruptcy fraud conspiracy to permit the introduction into evidence of incriminating hearsay statements of Cannatella's co-conspirators. Under *Geaney*, before a court may admit into evidence the out-of-court declarations of a defendant's co-conspirator, it must first find by "a fair preponderance of the evidence independent of the hearsay utterances" that the defendant participated in the conspiracy. Id. at 1120. The district court, in ruling that the *Geaney* test had been met, relied primarily on tape recorded phone conversations on June 1, 1977 between Cannatella and DePalma and on July 7, 1977 between Cannatella and Fusco. The court, however, also noted the presence of "additional evidence" connecting Cannatella with the conspiracy. We have reviewed the record, and we hold that the district court's determination that the *Geaney* standard had been met was correct. The telephone conversations noted by the district court clearly suggest that Cannatella knew of and was participating in the conspiracy to commit bankruptcy fraud by skimming the Theatre's receipts. Appellant argues, in elaborate detail, that each conversation is susceptible of an innocent in-

terpretation. That may be, but in each instance the judge and the jury could reject it (and they both obviously did), see United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977), particularly when, as here, the proffered interpretation is implausible.

Appellant also asserts that even if the *Geaney* standard was met and the hearsay declarations of his coconspirators were properly admitted, the evidence was insufficient to prove his guilt beyond a reasonable doubt. Our review of the evidence, however, persuades us that the jury reasonably could conclude that after 1976, Cannatella was exercising primary financial control over the Theatre, that the skimming of Theatre revenues continued unabated, and that Cannatella participated in the division and distribution of the skimmed revenues. Accordingly, the jury could reasonably find that Cannatella was guilty of the offenses charged.

IV. *Miscellaneous*

Both appellants raise additional subsidiary challenges to their conviction. For example, both appellants argue that the government engaged in improper conduct during the trial, while Weisman claims that various evidentiary rulings by the district court were incorrect and Cannatella asserts that Judge Sweet improperly marshalled the evidence with respect to him. We have reviewed all of appellants' arguments carefully, however, and find them to be without merit. Accordingly, the judgments of conviction are affirmed in all respects.

UNITED STATES of America, Plaintiff,

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Aug. 25, 1978.

SWEET, District Judge.*

The Indictment in this action was filed on June 2, 1978 and alleges a pattern of racketeering activity by the defendants center-

* At the request of the Court portions of the original opinion that have little precedential value have been omitted. The footnotes and internal divisions of the opinion have been renumbered.

ing on the corporate enterprise known as the Westchester Premier Theatre ("the Theatre") (Count One), a securities fraud (Counts Two through Twelve), a bankruptcy fraud (Counts Thirteen through Twenty-three) and an obstruction of justice (Count Twenty-four). The events giving rise to the charges occurred over a period from 1971 through 1978. The Indictment resulted from extensive electronic interceptions, data obtained from informants, and the admissions of certain of the defendants. There are ten defendants named. Not surprisingly defendants have filed extensive pretrial motions challenging the adequacy of the various counts of the Indictment, the propriety of joinder of the counts in the Indictment, seeking severance, dismissal of certain counts as a consequence of prosecutorial misconduct, striking certain material from the Indictment, requesting a bill of particulars, production of documents for inspection, and seeking a continuance.[1] This court has previously ordered evidentiary hearings relating to (1) the Government's compliance with the sealing and minimization requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, (2) the suppression of certain statements by defendant Weisman, and (3) the use of the Government of allegedly immunized testimony of defendant Weisman. The matters requiring evidentiary hearing will be dealt with in a subsequent opinion.

For the reasons set forth below, the motions to dismiss the Indictment, for misjoinder and severance are denied. The motion to strike certain matters from the Indictment, for a bill of particulars, document inspecting and for a continuance are granted to the extent set forth below.

I. COUNT ONE CHARGES AN OFFENSE.

Count One charges defendants Weisman, DePalma and Fusco with violating 18 U.S.C. § 1962 (c);[2] ("RICO"), in that they are alleged to have participated in a pattern of racketeering activity[3] in the conduct of the affairs of the Theatre through the commission of acts of securities fraud and bankruptcy fraud. Section 1962(c) is part of Title IX of the Organized Crime Control Act of 1970 (Public Law No. 91–452).

Title IX, entitled Racketeer Influenced and Corrupt Organizations, proscribes, *inter alia*, "the operation of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeering activity.'" H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong. & Ad.News, pp. 4007, 4010 (1970). Section 1961(1) of Title IX defines racketeering activity to include bankruptcy and securities fraud. A review of the legislative history relating to this statute evinces the concern of Congress in eliminating the influence of organized crime activities in our society. The Senate Report on the Organized Crime Control Act states as follows:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove

1. Each defendant has sought the benefit of the motions made by co-defendants. Reference will be made to a particular defendant's motion for the sake of clarity with the understanding that the discussion applies to all motions thus adopted.

2. 18 U.S.C.A. § 1962(c) provides:
"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

3. 18 U.S.C. § 1961(5) "defines 'pattern of racketeering activity' to require at least two acts of racketeering activity . . . . One act in the pattern must be engaged in after the effective date of the legislation. As amended by the Committee, the two acts necessary to establish the pattern must occur within a period of 10 years, excluding any period the perpetrator was in confinement." H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong & Ad.News, pp. 4007, 4032 (1970).

criminal influences from legitimate endeavor organizations.

* * * * * *

> Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. 78–79 (1969). This attitude was consistently endorsed in both the House and the Senate during hearings on this bill. It is in this context that the defendants' motions must be viewed.

A. *The Indictment Properly Alleges a Pattern of Racketeering.*

Defendant Weisman asserts that in order to establish a violation of 18 U.S.C. § 1962(c) the two acts of racketeering activity necessary to establish a "pattern" must be related. Claiming that the activities with respect to the alleged securities fraud are not related to the activities of the alleged bankruptcy fraud, Weisman seeks dismissal of Count One. The motion is denied.

The statutory definition of pattern of racketeering activity is unambiguous and contains no reference to any requirement of "relatedness." A review of the legislative history establishes that Congress was concerned with proscribing illegal activities of legitimate business, and that the only relation it deemed necessary for the two predicate acts is that they both be in the conduct of the affairs of the same enterprise. 18 U.S.C. § 1962(c) (1970).[4]

Two significant amendments to the definition of pattern of racketeering, prior to the enactment of the statute, lend further support to this view. Prior to these amendments the definition was as follows: "The term pattern of racketeering activity includes at least one act occurring after the effective date of this chapter." S. Rep. No. 617, *supra* at 122. Since "the term 'pattern' indicates that what is intended to be proscribed is not a single isolated act of 'racketeering activity,' but at least two such acts" (*id.*) the statute was amended to read as follows: "The term 'pattern of racketeering activity' means at least two acts, one of which occurred after the effective date of this chapter." *Id.* There was no requirement that the two acts be related to each other. In fact, at that point there was no requirement that the two acts even be related in time. This was the cause of some concern to those who commented on the proposed bill. *See e. g.* 116 Cong. Rec. S855 (daily ed. Jan. 22, 1970) (analysis of American Civil Liberties Union). Such concerns led to the enactment of the ten year limitation in the statute. It was this ten year limitation that provided any requirement of nexus between the two predicate acts. In its final form the statute simply required that the person commit at least two acts of racketeering activity within a ten year period.

Considering the time and effort spent by Congress on this definition, had it wanted to provide for any "relatedness", it had ample opportunity to do so. Instead Congress must have realized that the definition of "pattern of racketeering activity" would necessarily be interpreted in the context of the statute to which it applies (18 U.S.C. § 1962). Thus, the term "pattern", when used in this context, applies to the relationship of the acts to the enterprise, and no more. The definition of "racketeering activity" in the section and the additional definition of "pattern of racketeering activity", taken together, results in the conclu-

4. "A 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which . . . must have occurred subsequent to the enactment of the title." 116 Cong. Rec. H35, 295 (daily ed. Oct. 7, 1970) (remarks of Rep. Poff).

sion that the "pattern" definition states a minimum but not necessarily an exclusive definition. A main focus of Title IX was the enterprise,[5] not only the persons committing the acts, and Congress felt that the "pattern" would be supplied by this common factor.[6]

This interpretation was accepted by the court in *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978). The Fifth Circuit there noted that the Organized Crime Control Act

> does not criminalize either associating with an enterprise or engaging in a pattern of racketeering activity standing alone. The gravamen of the offense described in 18 U.S.C. § 1962(c) is the conduct of an enterprise's affairs through a pattern of racketeering activity. Thus, the Act does require a type of relatedness: the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other.

Id. at 899 n.23. This analysis is consistent with the legislative history. *United States v. Parness*, 503 F.2d 430, 438 and 442 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975) is also apposite in this regard. There, predicate acts of the RICO charge were three separate violations of 18 U.S.C. § 2314, all steps in a scheme to take over a hotel. Although these violations arguably had a greater nexus than merely steps in the common scheme, "there is no indication in *Parness* that the Court of Appeals requires anything more for the establishment of a 'pattern' within the meaning of § 1961(5) than two acts of racketeering . . ." *United States v. Moeller*, 402 F.Supp. 49, 58 n.7 (D.Conn.1975). Indeed, it has been noted in this district, in dictum, that "[t]here is no constitutional principle that would prevent Congress from labeling the commission of two crimes within a specified period of time and in the course of a particular type of enterprise a 'pattern' of activity, whether or not a sequence of two similar acts amounts to a pattern as that term is ordinarily understood." *United States v. Field*, 432 F.Supp. 55, 60–61 (S.D.N.Y.1977).

Defendant Weisman relies heavily on the opinion in *United States v. Stofsky*, 409 F.Supp. 609 (S.D.N.Y.1973) in support of his contention that the two acts themselves must be related in a greater degree than

5. It was noted during the Congressional hearings that

> "While prosecutions and convictions of leaders of organized crime and their confederates are increasing each year as the Federal Government's organized crime program gains momentum, it is becoming increasingly apparent that such convictions alone, which simply remove the leaders from control of syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other Cosa Nostra leaders, are not adequate to demolish the structure of the surviving organizations which they run. The legislative proposals contained in title IX of this act, entitled 'Racketeer influenced and corrupt organizations,' constitute a carefully structured program which can drastically curtail—and eventually eradicate—the vast expansion of organized crime's economic power which operates outside the rules of fair competition of the American marketplace."

116 Cong. Rec. S607 (daily ed. Jan. 21, 1970) remarks of Sen. Byrd.

6. "Subsection (5) defines 'pattern of racketeering activity' to require at least two acts of racketeering activity, as defined above.

> The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.
>
> The concept 'pattern' is thought to provide no due process constitutional barrier to criminal sanctions, as a 'racketeering activity,' defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. *See United States v. Nardello*, 393 U.S. 286 [89 S.Ct. 534, 21 L.Ed.2d 487] (1969)."

S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). The term "pattern" was thus intended to be read as part of the whole statute and not separately. Continuity (the two alleged frauds) plus relationship (the Theatre) exists here.

just to the affairs of the same enterprise. Although some of the language in *Stofsky* would support this position, the holding in the case does not go this far. In determining the constitutionality of 18 U.S.C. § 1962(c) the court in *Stofsky* stated that "[t]his Court therefore construes the word 'pattern' as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." *Id.* at 614. But this should not mean that the acts themselves must be interrelated. The common scheme or plan must be supplied in each instance by the enterprise, in the conduct of whose affairs the acts must be committed. Congress, after long analysis and debate, defined the term "pattern". Had Congress intended the definition of "pattern" used in 18 U.S.C. § 3575(e) (also part of the Organized Crime Control Act), which the court in *Stofsky* used to cast light on the § 1961(5) definition of "pattern", it could have specifically provided for such.[7] Instead Congress determined that the "enterprise" would be the common bridge between the two predicate acts and therefore specifically did not provide any other requirement or test of interrelatedness.[8]

It is perhaps reassuring, however, to note that the definition of "pattern" as set forth in 18 U.S.C. § 3575(e) has been met here, for the criminal acts alleged had the same "purposes", "participants", and are interrelated by "distinguishing characteristics and are not isolated events." The characteristics are the use of an apparently legitimate enterprise, the Theatre, as a vehicle to provide benefits to the participants in the pattern as a consequence of concealed criminal acts. If Congress intended this definition to be read into § 1961(5) it should have said so; but even if it had, the Indictment remains sufficient.

In *United States v. White*, 386 F.Supp. 882 (E.D.Wis.1974), cited by defendant Weisman, the court was concerned that absent a showing of a pattern of interrelatedness, 18 U.S.C. § 1962(c) could be used against the isolated acts of an independent criminal; therefore the two acts "must have a greater interrelationship than simply commission by a common perpetrator." *Id.* at 883. This court agrees that more than a common perpetrator is needed. However, the additional element is satisfied by a showing that the predicate acts were both committed in the conduct of the affairs of the same enterprise or business, therefore possessing a distinguishing characteristic, and are not isolated. *See generally* S. Rep. No. 617, 91st Cong., 1st Sess. (1969); 116 Cong. Rec. H35, 196 and H35, 197 (daily ed. Oct. 6, 1970).

Indeed the dictionary definition of pattern, whether in terms of a dress pattern or model, or a pattern of shot, implies separate, discrete elements which are placed together in a whole, a conception consistent with Congress' intent to deal with organized crime.

The Indictment here satisfies the definition of "pattern of racketeering activity"; both frauds are alleged to have been committed in the conduct of the Theatre's affairs and related to the essential functions that the Theatre served in the regular conduct of its affairs. *See United States v. Ladmer*, 429 F.Supp. 1231, 1245 (E.D.N.Y. 1977).

In fact, the alleged frauds are of exactly the type with which Congress was concerned when it enacted the Organized Crime Control Act. As noted by Senator Thurmond during hearings on the bill,

> One of the favorite devices of organized crime is to infiltrate a company, build it

7. 18 U.S.C. § 3575(e) defines "pattern of criminal conduct" as follows:

> ". . . Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

8. The court in *Stofsky* seems to acknowledge this when it states:

> "Set forth, then, on the face of the statute is a necessary connection between the person who would commit the enumerated predicate acts and the enterprise, and between the acts and that person's participation in the operations of the enterprise."

up, and then let it go broke so that it can take advantage of certain tax provisions and other devices thus disposing of or protecting a large treasury of illegally obtained dollars. This provision will help in curbing this activity.

116 Cong. Rec. S953 (daily ed. Jan. 23, 1970). Congress recognized that "[i]n business, the mob bleeds a firm of assets, then takes bankruptcy" (176 Cong. Rec. S591 (daily ed. Jan. 21, 1970) (remarks of Sen. McClellan)) and sought to protect the public from such occurrences. It is this type of situation which is alleged in this case.

Furthermore, even if the term "pattern" requires that the predicate acts themselves be interrelated, such exists between the alleged frauds:

(i) Defendants Weisman, Fusco and DePalma allegedly were each involved in both frauds.

(ii) The frauds allegedly were with respect to the same entity.

(iii) The stock fraud allegedly defrauded investors in the sale of the securities. The bankruptcy fraud allegedly defrauded these same investors, who would have been entitled to any remaining assets in the event the Chapter XI reorganization was successful.

(iv) The frauds allegedly had the same common goal of enriching those in control of and related to the Theatre through the use of illegal acts.

(v) Both frauds allegedly were committed well within the statutory requirement of ten years.

(vi) The alleged skimming activities bridge the gap between the securities fraud and the bankruptcy fraud, implying that both were anticipated by those in control of and related to this enterprise. Although the alleged skimming activities here cannot be considered, in themselves, as predicate acts necessary to prove a RICO violation, they still may be considered to prove a nexus between the two frauds. *Cf. United States v. Frumento*, 426 F.Supp. 797, 803 (E.D.Pa.1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed.2d 776 (1978) (jurors could consider acts of bribery as proof of motive, opportunity, intent, plan, knowledge and absence of mistake or accident although such could not be considered as constituting the pattern of racketeering activity). The Indictment sufficiently alleges a pattern of racketeering activity.

* * *

IV. COUNT XXIV WILL NOT BE DISMISSED.

Defendants Weisman and Horwitz seek dismissal of Count XXIV of the Indictment. Horwitz asserts a violation of his Fourth Amendment rights; both Weisman and Horwitz claim that their Sixth Amendment rights were violated and that any criminal activity to obstruct justice resulted from entrapment by the Government.

Horwitz's claim that use of informant Brodsky to record his conversations subsequent to his grand jury testimony violated his Fourth Amendment rights is without merit. The conversations were with a person who was cooperating with the Government; Horwitz had no Fourth Amendment protection that a person with whom he was conversing would not then or later reveal the conversation to legal authorities. *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1970); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Horwitz was not under indictment at the time (*Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)); there is no persuasive authority for the proposition that his testimony before the grand jury, and his invocation of his Fifth Amendment privilege, with counsel present, affords him a constitutionally protected expectation of privacy from that time forward.

[8] The alleged violation of the Sixth Amendment rights of Horwitz and Weisman is equally without authority. Reliance on *Massiah v. United States, supra*, is misplaced, for *Massiah* was concerned with post-indictment statements obtained without presence of counsel. "[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411 (1971). No case has come to this court's attention which has held that a defendant's testimony before a grand jury constitutes such proceedings. The arrest of Weisman on another unrelated charge does not alter the situation, that charge having been dismissed prior to any of the conversations here in question. *See United States v. Hinton*, 543 F.2d 1002, 1014–15 (2d Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976); *United States v. Missler*, 414 F.2d 1293, 1302–03 (4th Cir. 1969), *cert. denied*, 397 U.S. 913, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970); *United States v. Edwards*, 366 F.2d 853, 872–73 (2d Cir. 1966), *cert. denied*, 386 U.S. 919, 87 S.Ct. 852, 17 L.Ed.2d 782 (1967). The motions premised upon alleged violations of the Fourth and Sixth Amendment rights of Horwitz and Weisman are denied.

Defendants' claim that this court should dismiss Count XXIV of the Indictment due to the conduct of the Government in obtaining the evidence against them (an entrapment defense) is untimely. The law of entrapment was set forth by the Supreme Court in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 511 (1932):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises. [Citations omitted.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design. * * *. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Id. at 441–42, 53 S.Ct. at 212–13. Therefore, where the defense of entrapment is asserted, two questions of fact arise:

> (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.

United States v. Viviano, 437 F.2d 295, 298 (2d Cir.), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1659, 29 L.Ed.2d 149 (1971). These are usually questions for the jury. *See e. g. United States v. Quinn*, 543 F.2d 640, 647 (8th Cir. 1976).

However, Weisman and Horwitz assert that apart from any predisposition by them to commit the crime charged in Count XXIV, the Government's participation in the crime was so outrageous as to deprive them of their right to counsel and constituted such prosecutorial impropriety as to deprive them of the due process of law and that therefore, as a matter of law, they were entrapped. The Supreme Court has stated that some day the situation may be presented "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431–32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1972); *see also Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1975) (concurring and dissenting opinions). This day has not arrived for Weisman and Horwitz. Although the Government sought by use of its informer to confirm its view of defendants' conduct and to encourage them

to seek to obstruct justice, this court cannot conclude, at this stage of the proceedings, that it was so outrageous as to deny the defendants the due process of law.

For the purposes of this motion this court must review the facts in the light most favorable to the Government.[25] It is alleged that Horwitz and Weisman had been involved in a plan to arrange for a certain corporation (the "Corporation") to purchase 20,000 shares of the Theatre's stock by a $50,000 cash bribe to two officers of the Corporation. After the sale of the stock the Theatre was reimbursed by the Corporation, to be covered in part by an invoice of $30,000 to the law firm of informant Brodsky for legal services which had not been performed. During the grand jury investigation into this and related matters, Weisman told Brodsky that he would arrange for Horwitz to contact him so that they could get their stories straight. On two occasions Horwitz and Brodsky discussed the plan; at the conclusion of the second meeting Brodsky promised Horwitz he would keep him informed of what he was doing with respect to the grand jury investigation. Brodsky thereafter agreed to cooperate with the Government, wore a body recorder, and agreed to a wiretap of his telephone.

Based upon the information supplied to the Government by Brodsky, the Government had reason to believe that Horwitz and Weisman were counselling each other in an attempt to prevent the grand jury from learning the facts with respect to the payment by the Corporation. As part of his cooperation, Brodsky fabricated a story that his former law partner had been called to testify before the grand jury and that he needed some information, more specifically some names of employees of the Corporation, so that his former partner could answer questions by the grand jury as to the nature of the alleged legal work and the officer of the Corporation involved. It is in this presumed context that the assertions of Weisman and Horwitz must be viewed.

The Government did not implant the criminal design in the minds of Horwitz and Weisman; it merely conceived of a plan whereby it could obtain further evidence of such scheme. This was not a trap for the unwary innocent, but rather for the unwary. *See Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The use of deceit to obtain evidence of the crime is proper, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *United States v. Russell, supra* 411 U.S. at 436, 93 S.Ct. at 1645; *see also Osborn v. United States*, 385 U.S. 323, 326, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Furthermore, the technique used by the Government did not involve activities that resulted in injury to the rights of innocent citizens, a concern expressed by Judge Friendly in *United States v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973).

A review of the transcripts of the recorded conversations indicates that Weisman confirmed his participation in the plan without cajoling, enticement or duress by Brodsky. Weisman's allegation to the contrary is rejected. *See United States v. Viviano, supra*, 437 F.2d at 299.

Although defendant Horwitz presents a more difficult factual setting, a review of all the transcripts of the recorded conversations between Brodsky and Horwitz indicates that although Horwitz did not supply Brodsky with names until their second meeting (and after six telephone conversations) he did not resist any suggestions that the grand jury investigation be impeded and the facts, alleged to be true, be concealed. In fact, Horwitz appears to support the "story" that was already developed—that the legal fees were for some work with respect to a cable television deal, possibly some acquisitions, that Brodsky had lost his file as to any work done, that it was a legitimate fee since it had been recorded on Brodsky's tax return and that his recollec-

25. Any discussion of facts in the text is based upon this presumption. It should not be presumed, for any other purpose, that this court accepts the representations of the Government as to any alleged criminal activities or predisposition.

tion of five years ago was poor. It appears that his refusal to give names to Brodsky connotes not so much a desire not to do so, as his inability to get any names from the Corporation. The repeated attempts by Brodsky to get him to give names are not so outrageous as to be a denial of due process. They are properly a consideration for the jury in determining the element of propensity. *See United States v. Viviano, supra*, 437 F.2d at 299 n.2.

Defendant Horwitz has also moved to dismiss Count XXIV of the Indictment on the basis of two alleged irregularities before the grand jury. Horwitz asserts the Indictment should be dismissed for the failure of the Assistant United States Attorney to give appropriate instructions to the grand jury as to the law concerning the affirmative defense of entrapment and for the alleged failure to play seven of the eight tape recorded conversations between Brodsky and Horwitz. Horwitz has cited no direct authority for this proposition and, indeed, the rule appears to the contrary. An indictment valid on its face "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974). *See also United States v. Guillette*, 547 F.2d 743, 752 (2d Cir. 1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102.

Horwitz claims that the grand jury was deprived of its ability to " 'acting independently of either prosecuting attorney or judge,' " and a denial of the constitutional guarantee that the grand jury be 'a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States v. Dionisio*, 410 U.S. 1, 16–17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972) (citation omitted). These tapes and an instruction on the relevant law, according to Horwitz, would have established his defense of entrapment.

Normally, the prosecutor is under no duty to inform the grand jury of facts which would form the basis of a defense at trial. 8 *Moore's Federal Practice* ¶ 6.03[2] at 6-40 (1977). *See United States v. Ruyle*, 524 F.2d 1133, 1136 (6th Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976) (defendant not entitled to challenge indictment "on the ground that information which he considered favorable to his defense was not presented to the grand jury"). The grand jury's duty is to hear the State's evidence in order to decide whether the evidence is sufficient to warrant putting a person on trial for a crime. *Cobbs v. Robinson*, 528 F.2d 1331, 1338 (2d Cir. 1975).

The authorities relied upon by Horwitz do not alter the general proposition just set forth. In both *United States v. Provenzano*, 440 F.Supp. 561, 566 (S.D.N.Y. 1977) and *United States v. Phillips Petroleum Company*, 435 F.Supp. 610, 621 (N.D. Okl.1977), the courts dismissed indictments because of the failure of the prosecutor to present evidence to the grand jury which would directly contradict the testimony of key witnesses upon whom the indictments were based. In *United States v. Estepa, supra*, 471 F.2d at 1132, the court dismissed an indictment because the prosecuting attorney failed to advise the grand jury that key testimony establishing probable cause of a criminal act was based entirely on hearsay. Under these holdings evidence, known to the prosecutor, which tends to establish that the alleged criminal act did not occur must be disclosed. After noting the absence of any legal obligation to present exculpatory evidence to the grand jury under *United States v. Y. Hata Co.*, 535 F.2d 508, 512 (9th Cir. 1976), *cert. denied*, 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92; *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968), the Department of Justice guidelines require a prosecutor with personal knowledge of "substantial evidence which directly negates the guilt of a subject of the investigation" to present such evidence. Guidelines of the United States Department of Justice, issued December 16, 1977. For the reasons already set forth, *supra*, a review of the tapes in question by this court establishes that

the affirmative defense of entrapment does not directly negate the charge against Horwitz, nor do the tapes alone as the record now stands constitute substantial evidence to that effect. Moreover, no authorities have been presented to this court which require production and review of the grand jury evidence and instructions relating to the subjective disposition of Horwitz to commit a crime. The motion to seek such a result is denied. *United States v. DeMarco*, 401 F.Supp. 505, 513 (C.D.Cal.1975), *aff'd.*, 550 F.2d 1224 (9th Cir. 1977), relied upon by Horwitz, fails to persuade this court that advice and evidence relating to a defendant's affirmative defense must be submitted to a grand jury, even though dismissal of the indictment as a malicious prosecution brought for improper purposes appears justifiable.

UNITED STATES of America

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Sept. 21, 1978.

OPINION

SWEET, District Judge.

In an omnibus motion, all defendants in this multicount indictment alleging a pattern of racketeering activity and securities fraud and bankruptcy fraud conspiracies in connection with the operation of the Westchester Premier Theatre (the "Theatre") have moved, pursuant to Rule 41(b), Fed.R. Crim.P., and 18 U.S.C. § 2518(10)(a), for an order suppressing evidence obtained as a result of electronic surveillance authorized by five court orders:

a. An order signed March 10, 1977 by the Honorable Malcolm Lucas of the Central District of California ("Order # 1");

b. An order signed April 8, 1977 by Judge Lucas ("Order # 2");

c. An order signed May 5, 1977 by the Honorable Whitman Knapp of the Southern District of New York ("Order # 3");

d. An order signed June 21, 1977 by Judge Knapp ("Order # 4"): and

e. An order signed June 28, 1977 by Judge Knapp ("Order # 5").

The defendants have moved to suppress this wiretap evidence on the basis of the affidavits relied upon by the courts for issuance of the orders, failure of the Government to minimize properly the interception of nonpertinent communications, improper security surrounding the making and storage of tapes prior to sealing and failure to amend properly the orders.

In addition, defendant Weisman has moved to dismiss the indictment against him on the ground that the Government improperly utilized testimony Weisman had given in prior proceedings under an alleged grant of immunity. Weisman has also moved to suppress certain post-arrest statements made by him which the Government is alleged to have improperly obtained.

This court held hearings on August 8, 9, 10, 11, 28 and 29 with regard to factual issues raised by these motions. For the reasons stated below, defendants' motion to suppress evidence obtained through the five court ordered wiretaps is denied. The motions of defendant Weisman are granted with respect to certain statements and denied as to others.

The background of this action, including the allegations of the Indictment, have been set forth in this court's opinion of August 26, 1978 and will not be repeated here. As part of the Government's investigation of the alleged illegal activities which resulted in the instant Indictment, five wiretap orders, two in California and three in New York, were obtained and it is the fruits of these wiretaps which the defendants seek to exclude in this case.

* * *

II. *Weisman's Motions*

Use of Immunized Testimony.

On November 17, 1975 defendant Weisman testified before a New York State grand jury, allegedly about matters concerning the Theatre. Subsequently Weisman testified before the Honorable Harold Schwartzberg, United States Bankruptcy Judge, in the *Matter of the Westchester Premier Theatre, Inc.* (Docket No. 76 B 2926), a proceeding under Chapter XI of the Bankruptcy Act. This court held an evidentiary hearing to determine whether the grand jury proceedings which resulted in the present Indictment were tainted by the use of immunized testimony. After a review of all the evidence, including that submitted by the prosecution for in camera review,[40] it is the opinion of this court that there was no use of Weisman's testimony by the Government in obtaining the Indictment.

First, as to the New York State grand jury proceeding, Weisman signed a waiver of immunity form. Weisman having testified without any immunity, the Government would be free to use Weisman's testimony and therefore there is no taint.

40. This *in camera* review included the material relating to the 1975-1976 investigation, and 1977 bankruptcy files of the FBI.

As to Weisman's testimony in the bankruptcy proceeding, Weisman testified as an officer of the bankrupt corporation, not as the debtor in possession. According to the sworn testimony of Judge Schwartzberg, Weisman was not testifying under any grant of immunity; he was not designated by the court to perform the duties imposed upon the bankrupt. *See United States v. Castellano*, 349 F.2d 264, 273 (2d Cir. 1965), *cert. denied*, 383 U.S. 928, 86 S.Ct. 934, 15 L.Ed.2d 847 (1966); *United States v. Coyne*, 425 F.Supp. 171 (W.D.N.Y.1977). Therefore, there could be no taint resulting from Weisman's testimony in the bankruptcy proceeding.

Furthermore, the Government has satisfied this court that there was no use of Weisman's testimony in the bankruptcy proceeding in the investigation which led to the present Indictment. At the evidentiary hearing before this court the testimony of the Assistant United States Attorney in charge of this case negated any taint as to the Government's use of Weisman's testimony and stated affirmatively the sources of the evidence presented to the grand jury, namely, wiretaps, informants' evidence and the statements of certain of the co-conspirators. A review of the *in camera* information submitted to this court has established that the Government obtained the Indictment from legitimate sources independent of any of the Weisman testimony before the Bankruptcy Court, whether or not it was immunized. Therefore, the Government has satisfied its affirmative burden. *See United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977). The Indictment will not be suppressed.

Weisman's Motion to Suppress.

Defendant Weisman has moved to suppress certain statements made subsequent to his arrest on September 16, 1977 on a warrant charging him with violating Title 18, United States Code, Section 1014, relating to bank fraud, a charge unrelated to the present Indictment. The complaint upon which the warrant was issued alleges that on or about February 6, 1976, Weisman and his wife knowingly made false statements in an application to obtain a bank loan to purchase certain property. Weisman asserts that the complaint was issued without probable cause and that the interrogation subsequent to his arrest (i) was therefore an unreasonable search and seizure, in violation of his Fourth Amendment rights, (ii) was under circumstances rendering the statements involuntary, abrogating his Fifth Amendment rights and (iii) was without the presence of counsel, abridging his Sixth Amendment rights.

The warrants for the arrest of Weisman and his wife were issued on September 13, 1977 after a finding of probable cause by a Magistrate of this court. Weisman was thereafter kept under surveillance, and it was decided not to make the arrest while he was in the company of others. At approximately 3:00 p. m. on Friday, September 16, 1977, Weisman was alone in his car and was arrested. He was advised of the charge against him and was given his full *Miranda* warnings en route to FBI headquarters.

Upon arrival at FBI headquarters, he was shown an advice of rights form after being photographed and fingerprinted. During processing Weisman asked when he could place a call to his attorney and was told he could do so after the processing was completed. After processing he signed a Waiver of Rights form.[41] No call was placed to his attorney,[42] and he was not arraigned.

Weisman was then taken to an office in local FBI headquarters. At approximately 5:00 p. m. the Assistant United States Attorney arrived, again advised Weisman of his constitutional rights and informed him of the charges against him and his wife, including the possible racketeering charge against him and potential 20 year jail term thereunder.[43] Weisman was informed that although the Government could not make any promises, if he cooperated it would become known to the judge.[44]

Thereafter, Weisman was questioned, sometimes with as many as four people in the room. During the interrogation Weisman called his wife and asked her to meet him at FBI headquarters. Mrs. Weisman

41. The form states as follows:

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

42. The Government treated this not as a request, but simply as an inquiry as to when he could call should he desire to do so. Upon completion of processing the Government should have informed Weisman that he was free to call his attorney.

43. Assistant United States Attorney Akerman testified as follows:

Q Mr. Akerman, have you given some instructions to Agent Fisk on September 16th to have him hold Mr. Weisman for your arrival?

A No, I didn't instruct him to hold him for my arrival.

Q Did you tell him you wanted him to wait until you had the opportunity to question Mr. Weisman?

A No, because I was planning to be there at the same time that Mr. Weisman was brought there.

Q Did you tell Mr. Fisk to have Mr. Weisman brought forthwith for arraignment?

A No, I did not.

Q You wanted to question him that night, did you not?

A That's correct. Tr. 752, line 21–753, line 11.

44. Agent Fisk testified as follows:

Q What was said next, Agent Fisk?

A I don't recall exactly what was said next, but you asked for Mr. Weisman's cooperation in the cases.

Q What else did I tell him about his cooperation?

A You told him you couldn't make any promises to him and that his cooperation, if he did cooperate, would become known to a judge. Tr. 600, lines 2–10.

arrived at approximately 6:45 p. m., at which time she was advised by the Assistant United States Attorney of the warrant for her arrest and of her constitutional rights. Mrs. Weisman spoke to Weisman for a few minutes and placed a call to defendant DePalma; then Weisman requested that she leave the room. Mrs. Weisman remained in a waiting room while the questioning of Weisman continued until approximately 10:45 p. m. Weisman, due to his cooperation, was then permitted to return home with his wife.

The next day, a Saturday, Weisman was arraigned by the Honorable Whitman Knapp at his apartment. Weisman had expressed a fear that if he were arraigned publicly and not later prosecuted on that charge, certain others would suspect he was cooperating with the Government. At arraignment Judge Knapp informed Weisman of the complaint against him and of his constitutional rights. Weisman was then released on his own recognizance. Because Weisman feared for his physical safety, the complaint was sealed.

On Monday, September 19, 1977, Weisman met with the Assistant United States Attorney and two FBI agents at a motel in Connecticut which Weisman had chosen to assure secrecy. Prior to any conversation Weisman was again advised of his constitutional rights, and he signed another Waiver of Rights form. Weisman then answered questions put to him by the Government agents.

The face of the complaint indicates that it was dismissed by the Government on October 2, 1977, although this date, a Sunday, appears to be erroneous. On October 4, 1977, Weisman again met with Government agents. After being advised of his constitutional rights Weisman refused to sign a Waiver of Rights form or to cooperate with the Government. He was subsequently indicted on the charges in the case sub judice.

The complaint charging bank fraud, signed by FBI agent Brendan M. Fisk ("Fisk"), alleged, in pertinent part, as follows:

2) On or about February 6, *1976,* an application for a home mortgage loan was submitted to the Union Savings Bank of New York, 101 Mamaroneck Avenue, Mamaroneck, New York, by the defendants ELIOT H. WEISMAN and MAXINE L. WEISMAN who are husband and wife. The loan application was signed by both defendants.

3) The loan application referred to in paragraph 2 states that the defendant ELIOT H. WEISMAN is the President of the Westchester Premier Theatre and that his annual income *is* $50,000 and that the defendant MAXINE L. WEISMAN *is* employed by the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York and that her annual income *is* $2,000. These statements were knowingly false.

4) The payroll records of the Westchester Premier Theatre show that the defendant ELIOT H. WEISMAN earned $36,143 in *1975* from the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York, and that the defendant MAXINE L. WEISMAN *was* not on the payroll of the Westchester Premier Theatre in *1975.* (Emphasis added).

The complaint in paragraph 3 contains the allegation that the statements in the loan application were knowingly false, a handwritten allegation added by the Assistant United States Attorney just prior to taking the complaint to the Magistrate. The complaint contains no facts to establish that at the time the loan application was filled out in February 1976 Weisman was not earning the amount set forth in the application.

In *Jaben v. United States,* 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1964) the complaint, which was determined to set forth probable cause, alleged that the agent personally conducted an investigation in the course of which he examined defendants' tax returns, interviewed third persons and consulted public and private records as to the defendants' income. Although the complaint here, signed by Agent Fisk, states that the basis of his knowledge was "an

investigation conducted in the regular course of duties" there is no allegation that he personally conducted the investigation. Fisk testified that he first learned about the bank loan charge one week prior to the preparation of the complaint and that the facts were supplied to him by the Assistant United States Attorney on the case.[45] This situation is similar to the one which existed in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1957), since "the complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainants' belief [other than the 1975 payroll records, which are insufficient]; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." *Id.* at 486. Neither the complaint nor the testimony indicates that Fisk had any personal knowledge or source information as to the conclusory statement concerning the falsity of Weisman's application,[46] nor do they set forth the facts to establish the criminal intent element of the crime charged. *See Pugach v. Klein*, 193 F.Supp. 630, 639 (S.D. N.Y.1961).

Although the Government alleges that at the time the complaint was prepared it had in its possession the federal tax returns of Weisman for 1975 and 1976, which indicated that in neither year did Weisman earn what was set forth in the loan application nor was his wife employed at the theatre, Fisk testified that he had reviewed only the 1975 return before executing the affidavit. Furthermore, information derived from the tax returns was not contained in the complaint, nor was it submitted to the magistrate in the form of sworn testimony, nor did Fisk have knowledge concerning Weisman's 1976 income. Therefore, the tax returns cannot be considered in determining probable cause; "an adequate basis for such a finding had to appear on the face of the complaint" (*Giordenello v. United States*, 357 U.S. 480, 487, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1957)) or from sworn testimony. Fed. R.Crim.P. 41(c). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." (Emphasis in original). *Aguilar v. Texas, supra*, 378 U.S. at 109 n.1, 84 S.Ct. at 1511 (1963). A review of such information does not establish probable cause.

The absence of probable cause for the issuance of the warrant for the arrest of Weisman and the circumstances surrounding the arrest, require that his statements of September 16 be suppressed. The arrest afforded no lawful basis for procuring evidence with respect to an entirely different offense. *United States v. Edmons*, 432 F.2d 577, 582 (2d Cir. 1970).

45. Agent Fisk testified as follows:

Q Was it Mr. Akerman who said to you that the government had concluded that they wished to arrest Weisman on that bank loan fraud charge?

A Yes.

Q You certainly did not bring it to his attention.

A No. The facts were not—I wasn't in possession of the facts. Tr. 628, lines 5-12.

Q Did you tell the magistrate what he earned in 1976?

A No, I don't believe I did.

Q The charge, though, had to do with 1976, did it not?

A I presented the complaint on the approval of Mr. Akerman, who believed the probable cause, and it was signed, sir. Tr. 633, lines 18-25.

46. Agent Fisk testified as follows:

Q Mr. Fisk, was the Government's Exhibit 1 prepared by Mr. Akerman?

A Yes, it was.

Q It was typed at the U.S. Attorney's office?

A Yes, sir.

Q Did you make any changes on it?

A May I look at it, please?

Q Yes, sir.

A This additional statement was written in at the time.

Q You are referring now to the bottom of the last full paragraph on page 1, "These statements were knowingly false"?

A That's correct.

Q You wrote that?

A No, I did not.

Q Who did?

A Mr. Akerman.

Q Did you initial it?

A Yes. Tr. 635, line 17-636, line 12.

A major purpose for arresting Weisman on the bank loan charge was to obtain his cooperation on the investigation into the Theatre. This is borne out by testimony at the hearing, the circumstances of the arrest, including the Government's desire to keep others involved in the Theatre from knowing of the arrest, and the interrogation of Weisman immediately subsequent to his arrest almost solely as to the Theatre. Indeed, there is evidence that on September 12, 1978, the occasion of Weisman's testimony before the grand jury, Weisman's attorney had indicated to the Assistant United States Attorney that Weisman wished to cooperate.

The *Miranda* warnings given Weisman and his signature on a Waiver of Rights form do not cure the lack of probable cause and the need for suppression. *Brown v. Illinois*, 422 U.S. 590, 601–602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1974).

> Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. (Quotations in original.)

Id. at 602, 95 S.Ct. at 2261. Therefore, even if the statements by Weisman were determined by this court to have been voluntary under the Fifth Amendment,[47] the causal connection between the illegal arrest and the statements must be broken in order to purge the primary taint. *Brown, supra* at 601–02, 95 S.Ct. 2254; *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962). The determination of whether the statements were the product of free will must be determined by the facts of each case; "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Footnotes and citations omitted.]" *Brown, supra* at 603–04, 95 S.Ct. at 2261–62.

Weisman's arrest, and the surrounding circumstances, were part of a plan to assure his cooperation on a totally unrelated investigation. "The arrest, both in design and execution, was investigatory." *Brown, supra* at 605, 95 S.Ct. at 2262. The questioning with respect to the Theatre was not merely incidental to the arrest, but one of the main purposes of the arrest.

However, a different issue is presented with respect to the statements made on Monday, September 19, 1977, more than two days after the illegal arrest. These statements fall somewhere between the second confession by the defendant in *Brown*, which was determined to be the result and fruit of the first, and that made by the defendant in *Wong Sun*, which was several days after the illegal arrest. To locate the September 19 statements on this spectrum all the surrounding facts and circumstances are relevant. *See Tanner v. Vincent*, 541 F.2d 932, 936 (2d Cir. 1976), *cert. denied*, 429 U.S. 1065, 97 S.Ct. 794, 58 L.Ed.2d 782 (1977); *United States v. Toral*, 536 F.2d 893, 896 (9th Cir. 1976).

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

United States v. Bayer, 331 U.S. 532, 540–41, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654 (1946).

A review of the facts and circumstances indicates that the conditions which made Weisman's first statements inadmissible did not carry over to invalidate the subsequent

47. Due to the suppression based upon the Fourth Amendment this court need not address this issue.

statements. The second meeting was held over two days after Weisman's arrest. Weisman had been arraigned on the bank loan charge and released on his own recognizance. The meeting at which the statements were made took place at a motel chosen by Weisman and not in FBI headquarters. Weisman appeared on his own. Weisman's wife was not present, and there was no immediate threat of her arrest. Weisman was again given his *Miranda* warnings and signed a Waiver of Rights form. These intervening circumstances dissipated the original taint; there was a sufficient break in the stream of events to insulate the later statements. *Clewis v. Texas*, 386 U.S. 707, 710, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1966).

Furthermore, Weisman is a sophisticated businessman who was fully aware of his rights and who had just testified before the grand jury and had consulted counsel in connection with that testimony. He had an opportunity over the weekend to consult with his attorney or anyone else, although there is no testimony before this court that he did so. His statements of September 16 were not recorded, other than some sketchy notes by one agent, and he signed no written confession or similar document. The statements at the second meeting appear to have resulted from a voluntary and informed decision by Weisman to cooperate with the Government, *cf. United States v. Galante*, 547 F.2d 733 (2d Cir. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976), and not stimulated by a belief that he had nothing to lose. *See generally Knott v. Howard*, 511 F.2d 1060 (1st Cir. 1975). They were not the direct result and fruit of the first *Brown, supra* at 605; nor were they obtained in violation of his Fifth or Sixth Amendment rights. The September 19, 1977 statements of Weisman will not be suppressed.

SO ORDERED.

APPENDIX C

DISTRICT COURT OPINION, NOVEMBER 26, 1979
(Pg. 834a-836a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* VS. GREGORY DE PALMA, et al, *Defendants.*	78 Civ. 401 (RWS) OPINION

APPEARANCES

NATHANIEL AKERMAN, ESQ.
Assistant United States Attorney
Attorney for Plaintiff
One St. Andrew's Plaza
New York, New York 10007

GRAND & OSTROW, ESQS.
Attorneys for Defendant Eliot Weisman
375 Park Avenue
New York, New York 10022

S W E E T, D. J.

By order dated November 21, 1979, the Second Circuit remanded the appeal of this case for clarification of the record on the issue of whether this court's denial of Eliot Weisman's post-trial motion for a new trial was based in part on the issue of reverse immunity. The record should reflect that this court did not consider the issue of reverse immunity with respect to defendant Weisman because he failed to raise that issue in connection with his motion for a new trial.

Throughout the first and second trials in *United States v. DePalma,* 78-401, a motion made by one defendant during the course of the trial was deemed to have been made by all defendants for the purpose of expedition. This practice was employed primarily on evidentiary objections and was not specified to apply to post-trial proceedings.

During the first trial, defendant Leonard Horwitz raised the issue of reverse immunity by making a motion to grant immunity to two witnesses or to admit their grand jury testimony into evidence. In the opinion denying that request, this court noted that the motion was made by Horwitz, *United States v. DePalma,* No. 78-401 (S.D.N.Y. Dec. 21, 1978), and at no time did Weisman's counsel attempt to correct the record to reflect that Weisman also raised that issue.

After the conclusion of the second trial, Horwitz moved for a new trial, again relying on the issue of reverse immunity. Weisman also filed a motion for a new trial, raising several grounds for relief but not mentioning the reverse immunity claim. No arguments on this issue were made on behalf of Weisman. Because the immunized testimony against Horwitz made up the bulk of the

evidence against him, it would have been incumbent upon Weisman, who was in a somewhat different evidentiary position, to address the proof as it applied to him in order to advance the same claim of deprivation of a constitutional right.

In light of these circumstances, Weisman failed to properly raise the issue of reverse immunity prior to the time of appeal. The record shall be deemed clarified in accordance with this opinion.

IT IS SO ORDERED:

ROBERT W. SWEET
Robert W. Sweet
U.S.D.J.

Dated: New York, New York
November 26, 1979

STATUTORY ADDENDUM

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (related to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections

2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political

subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

* * *

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law

or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. Added. Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisonment not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

* * *

Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

80-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

ELIOT H. WEISMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN OSTROW
GRAND & OSTROW
375 Park Avenue
New York, New York 10152
Attorneys for Petitioner

TABLE OF CONTENTS

Page

Appendix B:

United States v. *DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978) B-1

United States v. *DePalma*, 461 F. Supp. 800 (S.D.N.Y. 1978) B-20

Appendix D:

United States Court of Appeals, Second Circuit, Denial of Petition for Rehearing, June 10, 1980 ..... D-1

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Aug. 25, 1978.

SWEET, District Judge.*

The Indictment in this action was filed on June 2, 1978 and alleges a pattern of racketeering activity by the defendants centering on the corporate enterprise known as the Westchester Premier Theatre ("Theatre") (Count One), a securities fraud (Counts Two through Twelve), a bankruptcy fraud (Counts Thirteen through Twenty-three) and an obstruction of justice (Count Twenty-four). The events giving rise to the charges occurred over a period from 1971 through 1978. The Indictment resulted from extensive electronic interceptions, data obtained from informants, and the admissions of certain of the

* At the request of the Court portions of the original opinion that have little precedential value have been omitted. The footnotes and internal divisions of the opinion have been renumbered.

defendants. There are ten defendants named. Not surprisingly defendants have filed extensive pretrial motions challenging the adequacy of the various counts of the Indictment, the propriety of joinder of the counts in the Indictment, seeking severance, dismissal of certain counts as a consequence of prosecutorial misconduct, striking certain material from the Indictment, requesting a bill of particulars, production of documents for inspection, and seeking a continuance.[1] This court has previously ordered evidentiary hearings relating to (1) the Government's compliance with the sealing and minimization requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, (2) the suppression of certain statements by defendant Weisman, and (3) the use of the Government of allegedly immunized testimony of defendant Weisman. The matters requiring evidentiary hearing will be dealt with in a subsequent opinion.

For the reasons set forth below, the motions to dismiss the Indictment, for misjoinder and severance are denied. The motion to strike certain matters from the Indictment, for a bill of particulars, document inspecting and for a continuance are granted to the extent set forth below.

I. COUNT ONE CHARGES AN OFFENSE.

Count One charges defendants, Weisman, DePalma and Fusco with violating 18 U.S.C. §1962 (c);[2]

---

[1] Each defendant has sought the benefit of the motions made by co-defendants. Reference will be made to a particular defendant's motion for the sake of clarity with the understanding that the discussion applies to all motions thus adopted.

[2] 18 U.S.C.A. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

("RICO"), in that they are alleged to have participated in a pattern of racketeering activity[3] in the conduct of the affairs of the Theatre through the commission of acts of securities fraud and bankruptcy fraud. Section 1962(c) is part of Title IX of the Organized Crime Control Act of 1970 (Public Law No. 91-452).

Title IX, entitled Racketeer Influenced and Corrupt Organizations, proscribes, *inter alia,* "the operation of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeering activity.' " H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong. & Ad.News, pp. 4007, 4010 (1970). Section 1961(1) of Title IX defines racketeering activity to include bankruptcy and securities fraud. A review of the legislative history relating to this statute evinces the concern of Congress in eliminating the influence of organized crime activities in our society. The Senate Report on the Organized Crime Control Act states as follows:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations.
>
> * * * * * *
>
> Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this

---

[3] 18 U.S.C. § 1961(5) "defines 'pattern of racketeering activity' to require at least two acts of racketeering. . . . One act in the pattern must be engaged in after the effective date of the legislation. As amended by the Committee, the two acts necessary to establish the pattern must occur within a period of 10 years, excluding any period the perpetrator was in confinement." H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong. & Ad News, pp. 4007, 4032 (1970).

> failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. 78-79 (1969). This attitude was consistently endorsed in both the House and the Senate during hearings on this bill. It is in this context that the defendants' motions must be viewed.

A. *The Indictment Properly Alleges a Pattern of Racketeering.*

Defendant Weisman asserts that in order to establish a violation of 18 U.S.C. § 1962(c) the two acts of racketeering activity necessary to establish a "pattern" must be related. Claiming that the activities with respect to the alleged securities fraud are not related to the activities of the alleged bankruptcy fraud, Weisman seeks dismissal of Count One. The motion is denied.

The statutory definition of pattern of racketeering activity is unambiguous and contains no reference to any requirement of "relatedness." A review of the legislative history establishes that Congress was concerned with proscribing illegal activities of legitimate business, and that the only relation it deemed necessary for the two predicate acts is that they both be in the conduct of the affairs of the same enterprise. 18 U.S.C. § 1962(c)(1970).[4]

[4] "A 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which . . . must have occurred subsequent to the enactment of the title." 116 Cong. Rec. H35, 295 (daily ed. Oct. 7, 1970) (remarks of Rep. Poff).

Two significant amendments to the definition of pattern of racketeering, prior to the enactment of the statute, lend further support to this view. Prior to these amendments the definition was as follows: "The term pattern of racketeering activity includes at least one act occurring after the effective date of this chapter." S. Rep. No. 617, *supra* at 122. Since "the term 'pattern' indicates that what is intended to be proscribed is not a single isolated act of 'racketeering activity,' but at least two such acts" (*id.*) the statute was amended to read as follows: "The term 'pattern of racketeering activity' means at least two acts, one of which occurred after the effective date of this chapter." *Id.* There was no requirement that the two acts be related to each other. In fact, at that point there was no requirement that the two acts even be related in time. This was the cause of some concern to those who commented on the proposed bill. *See e.g.* 116 Cong. Rec. S855 (daily ed. Jan. 22, 1970)(analysis of American Civil Liberties Union). Such concerns led to the enactment of the ten year limitation in the statute. It was this ten year limitation that provided any requirement of nexus between the two predicate acts. In its final form the statute simply required that the person commit at least two acts of racketeering activity within a ten year period.

Considering the time and effort spent by Congress on this definition, had it wanted to provide for any "relatedness", it had ample opportunity to do so. Instead Congress must have realized that the definition of "pattern of racketeering activity" would necessarily be interpreted in the context of the statute to which it applies (18 U.S.C. §1962). Thus, the term "pattern", when used in this context, applies to the relationship of the acts to the enterprise, and no more. The definition of "racketeering activity" in the section and the additional definition of "pattern of "racketeering activity", taken together, results

in the conclusion that the "pattern" definition states a minimum but not necessarily an exclusive definition. A main focus of Title IX was the enterprise,[5] not only the persons committing the acts, and Congress felt that the "pattern" would be supplied by this common factor.[6]

This interpretation was accepted by the court in *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978).

---

[5] It was noted during the Congressional hearings that

"While prosecutions and convictions of leaders of organized crime and their confederates are increasing each year as the Federal Government's organized crime program gains momentum, it is becoming increasingly apparent that such convictions alone, which simply remove the leaders from control of syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other Cosa Nostra leaders, are not adequate to demolish the structure of the surviving organizations which they run. The legislative proposals contained in title IX of this act, entitled 'Racketeer influenced and corrupt organizations,' constitute a carefully structured program which can drastically curtail—and eventually eradicate—the vast expansion of organized crime's economic power which operates outside the rules of fair competition of the American marketplace."

116 Cong. Rec. S607 (daily ed. Jan. 21, 1970) remarks of Sen. Byrd.

[6] "Subsection (5) defines 'pattern of racketeering activity' to require at least two acts of racketeering activity, as defined above.

The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

The concept 'pattern' is thought to provide no due process constitutional barrier to criminal sanctions, as a 'racketeering activity,' defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. *See United States v. Nardello,* 393 U.S. 286 [89 S.Ct. 534, 21 L.Ed.2d 487] (1969)."

S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). The term "pattern" was thus intended to be read as part of the whole statute and not separately. Continuity (the two alleged frauds) plus relationship (the Theatre) exists here.

The Fifth Circuit there noted that the Organized Crime Control Act

> does not criminalize either associating with an enterprise or engaging in a pattern of racketeering activity standing alone. The gravamen of the offense described in 18 U.S.C. §1962(c) is the conduct of an enterprise's affairs through a pattern of racketeering activity. Thus, the Act does require a type of relatedness: the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other.

Id. at 899 n.23. This analysis is consistent with the legislative history. *United States v. Parness,* 503 F.2d 430, 438 and 442 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975) is also apposite in this regard. There, predicate acts of the RICO charge were three separate violations of 18 U.S.C. §2314, all steps in a scheme to take over a hotel. Although these violations arguably had a greater nexus than merely steps in the common scheme, "there is no indication in *Parness* that the Court of Appeals requires anything more for the establishment of a 'pattern' within the meaning of §1961(5) than two acts of racketeering . . ." *United States v. Moeller,* 402 F. Supp. 49, 58 n.7 (D.Conn.1975). Indeed, it has been noted in this district, in dictum, that "[t]here is no constitutional principle that would prevent Congress from labeling the commission of two crimes within a specified period of time and in the course of a particular type of enterprise a 'pattern' of activity, whether or not a sequence of two similar acts amounts to a pattern as that term is ordinarily understood." *United States v. Field,* 432 F.Supp. 55, 60-61 (S.D.N.Y.1977).

Defendant Weisman relies heavily on the opinion in *United States v. Stofsky,* 409 F.Supp. 609 (S.D.N.Y.1973)

in support of his contention that the two acts themselves must be related in a greater degree than just to the affairs of the same enterprise. Although some of the language in *Stofsky* would support this position, the holding in the case does not go this far. In determining the constitutionality of 18 U.S.C. §1962(c) the court in *Stofsky* stated that "[t]his Court therefore construes the word 'pattern' as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to consititue a pattern and not simply a series of disconnected acts." *Id.* at 614. But this should not mean that the acts themselves must be interrelated. The common scheme or plan must be supplied in each instance by the enterprise, in the conduct of whose affairs the acts must be committed. Congress, after long analysis and debate, defined the term "pattern". Had Congress intended the definition of "pattern" used in 18 U.S.C. §3575(e)(also part of the Organized Crime Control Act), which the court in *Stofsky* used to cast light on the §1961(5) definition of "pattern", it could have specifically provided for such.[7] Instead Congress determined that the "enterprise" would be the common bridge between the two predicate acts and therefore specifically did not provide any other requirement or test of interrelatedness.[8]

---

[7] 18 U.S.C. § 3575(e) defines "pattern of criminal conduct" as follows:

> ". . . Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

[8] The court in *Stofsky* seems to acknowledge this when it states: "Set forth, then, on the face of the statute is a necessary connection between the person who would commit the enumerated predicate acts and the enterprise, and between the acts and that person's participation in the operations of the enterprise."

It is perhaps reassuring, however, to note that the definition of "pattern" as set forth in 18 U.S.C. §3575(e) has been met here, for the criminal acts alleged had the same "purposes", "participants", and are interrelated by "distinguishing characteristics and are not isolated events." The characteristics are the use of an apparently legitimate enterprise, the Theatre, as a vehicle to provide benefits to the participants in the pattern as a consequence of concealed criminal acts. If Congress intended this definition to be read into §1961(5) it should have said so; but even if it had, the Indictment remains sufficient.

In *United States v. White,* 386 F.Supp. 882 (E.D.Wis.1974), cited by defendant Weisman, the court was concerned that absent a showing of a pattern or interrelatedness, 18 U.S.C. §1962(c) could be used against the isolated acts of an independent criminal; therefore the two acts "must have a greater interrelationship than simply commission by a common perpetrator." *Id.* at 883. This court agrees that more than a common perpetrator is needed. However, the additional element is satisfied by a showing that the predicate acts were both committed in the conduct of the affairs of the same enterprise or business, therefore possessing a distinguishing characteristic, and are not isolated. *See generally* S. Rep. No. 617, 91st Cong., 1st Sess. (1969); 116 Cong. Rec. H35, 196 and H35, 197 (daily ed. Oct. 6, 1970).

Indeed the dictionary definition of pattern, whether in terms of a dress pattern or model, or a pattern of shot, implies separate, discrete elements which are placed together in a whole, a conception consistent with Congress' intent to deal with organized crime.

The Indictment here satisfies the definition of "pattern of recketeering activity"; both frauds are alleged to

have been committed in the conduct of the Theatre's affairs and related to the essential functions that the Theatre served in the regular conduct of its affairs. *See United States v. Ladmer,* 429 F.Supp. 1231, 1245 (E.D.N.Y. 1977).

In fact, the alleged frauds are of exactly the type with which Congress was concerned when it enacted the Organized Crime Control Act. As noted by Senator Thurmond during hearings on the bill,

> One of the favorite devices of organized crime is to infiltrate a company, build it up, and then let it go broke so that it can take advantage of certain tax provisions and other devices thus disposing of or protecting a large treasury of illegally obtained dollars. This provision will help in curbing this activity.

116 Cong. Rec. S953 (daily ed. Jan. 23, 1970). Congress recognized that "[i]in business, the mob bleeds a firm of assets, then takes bankruptcy" (176 Cong. Rec. S591 (daily ed. Jan. 21, 1970) (remarks of Sen. McClellan)) and sought to protect the public from such occurrences. It is this type of situation which is alleged in this case.

Furthermore, even if the term "pattern" requires that the predicate acts themselves be interrelated, such exists between the alleged frauds:

> (i) Defendants Weisman, Fusco and DePalma allegedly were each involved in both frauds.
>
> (ii) The frauds allegedly were with respect to the same entity.
>
> (iii) The stock fraud allegedly defrauded investors in the sale of the securities. The bankruptcy fraud allegedly defrauded these same investors, who would have been entitled to any remaining assets in

the event the Chapter XI reorganization was successful.

(iv) The frauds allegedly had the same common goal of enriching those in control of and related to the theatre through the use of illegal acts.

(v) Both frauds allegedly were committed well within the statutory requirement of ten years.

(vi) The alleged skimming activities bridge the gap between the securities fraud and the bankruptcy fraud, implying that both were anticipated by those in control of and related to this enterprise. Although the alleged skimming activities here cannot be considered in themselves, as predicate acts necessary to prove a RICO violation, they still may be considered to prove a nexus between the two frauds. *Cf. United States v. Frumento,* 426 F.Supp. 797, 803 (E.D.Pa.1976), *aff'd,* 563 F.2d 1083 (3d Cir. 1977), *cert. denied,* 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed.2d 776 (1978) (jurors could consider acts of bribery as proof of motive, opportunity, intent, plan, knowledge and absence of mistake or accident although such could not be considered as constituting the pattern of racketeering activity). The Indictment sufficiently alleges a pattern of racketeering activity.

* * *

IV. COUNT XXIV WILL NOT BE DISMISSED.

Defendants Weisman and Horwitz seek dismissal of Count XXIV of the Indictment. Horwitz asserts a violation of his Fourth Amendment rights; both Weisman and Horwitz claim that their Sixth Amendment rights were violated and that any criminal activity to obstruct justice resulted from entrapment by the Government.

Horwitz's claim that use of informant Brodsky to record his conversations subsequent to his grand jury testimony violated his Fourth Amendment rights is without merit. The conversations were with a person who was cooperating with the Government; Horwitz had no Fourth Amendment protection that a person with whom he was conversing would not then or later reveal the conversation to legal authorities. *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed2d 453 (1970); *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Horwitz was not under indictment at the time (*Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)); there is no persuasive authority for the proposition that his testimony before the grand jury, and his invocation of his Fifth Amendment privilege, with counsel present, affords him a constitutionally protected expectation of privacy from that time forward.

[8] The alleged violation of the Sixth Amendment rights of Horwitz and Weisman is equally without authority. Reliance on *Massiah v. United States, supra,* is misplaced, for *Massiah* was concerned with post-indictment statements obtained without presence of counsel. "[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411 (1971). No case has come to this court's attention which has held that a defendant's testimony before a grand jury constitutes such proceedings. The arrest of Weisman on another unrelated charge does not alter the situation, that charge having been dismissed prior to any of the conversations here in question. *See United States v. Hinton,* 543 F.2d 1002, 1014—15 (2d Cir.), *cert. denied,* 429 U.S. 980,

97 S.Ct. 493, 50L.Ed.2d 589 (1976); *United States v. Missler,* 414 F.2d 1293, 1302—03 (4th Cir. 1969), *cert. denied,* 397 U.S. 913, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970); *United States v. Edwards,* 366 F.2d 853, 872—73 (2d Cir. 1966), *cert. denied,* 386 U.S. 919, 87 S.Ct. 852, 17L.Ed.2d 782 (1967). The motions premised upon alleged violations of the Fourth and Sixth Amendment rights of Horwitz and Weisman are denied.

Defendants' claim that this court should dismiss Count XXIV of the Indictment due to the conduct of the Government in obtaining the evidence against then (an entrapment defense) is untimely. The law of entrapment was set forth by the Supreme Court in *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 511 (1932):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises. [Citations omitted.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design. * * * A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Id. at 441—42; 53 S.Ct. at 212—13. Therefore, where the defense of entrapment is asserted, two questions of fact arise:

> (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and

> was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.

United States v. Viviano, 437 F.2d 295, 298 (2d Cir.), *cert. denied,* 402 U.S. 983, 91 S.Ct. 1659, 29 L.Ed.2d 149 (1971). These are usually questions for the jury. *See e. g. United States v. Quinn,* 543 F.2d 640, 647 (8th Cir. 1976).

However, Weisman and Horwitz assert that apart from any predisposition by them to commit the crime charged in Count XXIV, the Government's participation in the crime was so outrageous as to deprive them of their right to counsel and constituted such prosecutorial impropriety as to deprive them of the due process of law and that therefore, as a matter of law, they were entrapped. The Supreme Court has stated that someday the situation may be presented "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431—32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1972); *see also Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1975) (concurring and dissenting opinions). This day has not arrived for Weisman and Horwitz. Although the Government sought by use of its informer to confirm its view of defendants' conduct and to encourage them to seek to obstruct justice, this court cannot conclude, at this stage of the proceedings, that it was so outrageous as to deny the defendants the due process of law.

For the purposes of this motion this court must review the facts in the light most favorable to the Government.[25]

---

[25] Any discussion of facts in the text is based upon this presumption. It should not be presumed, for any other purpose, that this court accepts the representations of the Government as to any alleged criminal activities or predisposition.

It is alleged that Horwitz and Weisman had been involved in a plan to arrange for a certain corporation (the "Corporation") to purchase 20,000 shares of the Theatre's stock by a $50,000 cash bribe to two officers of the Corporation. After the sale of the stock the Theatre was reimbursed by the Corporation, to be covered in part by an invoice of $30,000 to the law firm of informant Brodsky for legal services which had not been performed. During the grand jury investigation into this and related matters, Weisman told Brodsky that he would arrange for Horwitz to contact him so that they could get their stories straight. On two occasions Horwitz and Brodsky discussed the plan; at the conclusion of the second meeting Brodsky promised Horwitz he would keep him informed of what he was doing with respect to the grand jury investigation. Brodsky thereafter agreed to cooperate with the Government, wore a body recorder, and agreed to a wiretap of his telephone.

Based upon the information supplied to the Government by Brodsky, the Government had reason to believe that Horwitz and Weisman were counselling each other in an attempt to prevent the grand jury from learning the facts with respect to the payment by the Corporation. As part of his cooperation, Brodsky fabricated a story that his former law partner had been called to testify before the grand jury and that he needed some information, more specifically some names of employees of the Corporation, so that his former partner could answer questions by the grand jury as to the nature of the alleged legal work and the officer of the Corporation involved. It is in this presumed context that the assertions of Weisman and Horwitz must be viewed.

The Government did not implant the criminal design in the minds of Horwitz and Weisman; it merely con-

ceived of a plan whereby it could obtain further evidence of such scheme. This was not a trap for the unwary innocent, but rather for the unwary. *See Sherman v. United States,* 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The use of deceit to obtain evidence of the crime is proper, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *United States v. Russell, supra* 411 U.S. at 436, 93 S.Ct. at 1645; *see also Osborn v. United States,* 385 U.S. 323, 326, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Furthermore, the technique used by the Government did not involve activities that resulted in unjury to the rights of innocent citizens, a concern expressed by Judge Friendly in *United States v. Archer,* 486 F.2d 670, 677 (2d Cir. 1973).

A review of the transcripts of the recorded conversations indicates that Weisman confirmed his participation in the plan without cajoling, enticement or duress by Brodsky. Weisman's allegation to the contrary is rejected. *See United States v. Viviano, supra,* 437 F.2d at 299.

Although defendant Horwitz presents a more difficult factual setting, a review of all the transcripts of the recorded conversations between Brodsky and Horwitz indicates that although Horwitz did not supply Brodsky with names until their second meeting (and after six telephone conversations) he did not resist any suggestions that the grand jury investigation be impeded and the facts, alleged to be true, be concealed. In fact, Horwitz appears to support the "story" that was already developed—that the legal fees were for some work with respect to a cable television deal, possibly some acquisitions, that Brodsky had lost his file as to any work done, that it was a legitimate fee since it had been recorded on Brodsky's tax return and that his recollection of five years ago was poor.

It appears that his refusal to give names to Brodsky connotes not so much a desire not to do so, as his inability to get any names from the Corporation. The repeated attempts by Brodsky to get him to give names are not so outrageous as to be a denial of due process. They are properly a consideration for the jury in determining the element of propensity. *See United States v. Viviano, supra,* 437 F.2d at 299 n.2.

Defendant Horwitz has also moved to dismiss Count XXIV of the Indictment on the basis of two alleged irregularities before the grand jury. Horwitz asserts the Indictment should be dismissed for the failure of the Assistant United States Attorney to give appropriate instructions to the grand jury as to the law concerning the affirmative defense of entrapment and for the alleged failure to play seven of the eight tape recorded conversations between Brodsky and Horwitz. Horwitz has cited no direct authority for this proposition and, indeed, the rule appears to the contrary. An indictment valid on its face "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra,* 414 U.S. 338, 345, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974). *See also United States v. Guillette,* 547 F.2d 743, 752 (2d Cir. 1976), *cert. denied,* 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102.

Horwitz claims that the grand jury was deprived of its ability to " 'acting independently of either prosecuting attorney or judge,' " and a denial of the constitutional guarantee that the grand jury be a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." (sic) *United States v. Dionisio,* 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972) (citation omitted). These tapes and an instruction

on the relevant law, according to Horwitz, would have established his defense of entrapment.

Normally, the prosecutor is under no duty to inform the grand jury of facts which would form the basis of a defense at trial. 8 *Moore's Federal Practice* ¶6.03[2] at 6-40 (1977). *See United States v. Ruyle,* 524 F.2d 1133, 1136 (6th Cir. 1975), *cert. denied,* 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976) (defendant not entitled to challenge indictment "on the ground that information which he considered favorable to his defense was not presented to the grand jury"). The grand jury's duty is to hear the State's evidence in order to decide whether the evidence is sufficient to warrant putting a person on trial for a crime. *Cobbs v. Robinson,* 528 F.2d 1331, 1338 (2d Cir. 1975).

The authorities relied upon by Horwitz do not alter the general proposition just set forth. In both *United States v. Provenzano,* 440 F.Supp. 561, 566 (S.D.N.Y.1977) and *United States v. Phillips Petroleum Company,* 435 F.Supp. 610, 621 (N.D.Okl.1977), the courts dismissed indictments because of the failure of the prosecutor to present evidence to the grand jury which would directly contradict the testimony of key witnesses upon whom the indictments were based. In *United States v. Estepa, supra,* 471 F.2d at 1132, the court dismissed an indictment because the prosecuting attorney failed to advise the grand jury that key testimony establishing probable cause of a criminal act was based entirely on hearsay. Under these holdings evidence, known to the prosecutor, which tends to establish that the alleged criminal act did not occur must be disclosed. After noting the absence of any legal obligation to present exculpatory evidence to the grand jury under *United States v. Y. Hata Co.,* 535 F.2d 508, 512 (9th Cir. 1976), *cert, denied,* 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92; *Loraine v. United*

States, 396 F.2d 335, 339 (9th Cir.), *cert. denied,* 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968), the Department of Justice guidelines require a prosecutor with personal knowledge of "substantial evidence which directly negates the guilt of a subject of the investigation" to present such evidence. Guidelines of the United States Department of Justice, issued December 16, 1977. For the reasons already set forth, *supra,* a review of the tapes in question by this court establishes that the affirmative defense of entrapment does not directly negate the charge against Horwitz, nor do the tapes alone as the record now stands constitute substantial evidence to that effect. Moreover, no authorities have been presented to this court which require production and review of the grand jury evidence and instructions relating to the subjective disposition of Horwitz to commit a crime. The motion to seek such a result is denied. *United States v. DeMarco,* 401 F.Supp. 505, 513 (C.D.Cal.1975), *aff'd,* 550 F.2d 1224 (9th Cir. 1977), relied upon by Horwitz, fails to persuade this court that advice and evidence relating to a defendant's affirmative defense must be submitted to a grand jury, even though dismissal of the indictment as a malicious prosecution brought for improper purposes appears justifiable.

UNITED STATES of America

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Sept. 21, 1978.

OPINION

SWEET, District Judge.

In an omnibus motion, all defendants in this multicount indictment alleging a pattern of racketeering activity and securities fraud and bankruptcy fraud conspiracies in connection with the operation of the Westchester Premier Theatre (the "Theatre") have moved, pursuant to Rule 41(b), Fed.R.Crim.P., and 18 U.S.C. § 2518(10)(a), for an order suppressing evidence obtained as a result of electronic surveillance authorized by five court orders:

a. An order signed March 10, 1977 by the Honorable Malcolm Lucas of the Central District of California ("Order #1");

b. An order signed April 8, 1977 by Judge Lucas ("Order # 2");

c. An order signed May 5, 1977 by the Honorable Whitman Knapp of the Southern District of New York ("Order # 3");

d. An order signed June 21, 1977 by Judge Knapp ("Order # 4"); and

e. An order signed June 28, 1977 by Judge Knapp ("Order # 5").

The defendants have moved to suppress this wiretap evidence on the basis of the affidavits relied upon by the courts for issuance of the orders, failure of the Government to minimize properly the interception of nonpertinent communications, improper security surrounding the making and storage of tapes prior to sealing and failure to amend properly the orders.

In addition, defendant Weisman has moved to dismiss the indictment against him on the ground that the

Government improperly utilized testimony Weisman had given in prior proceedings under an alledged grant of immunity. Weisman has also moved to suppress certain post-arrest statements made by him which the Government is alleged to have improperly obtained.

This court held hearings on August 8, 9, 10, 11, 28 and 29 with regard to factual issues raised by these motions. For the reasons stated below, defendants' motion to suppress evidence obtained through the five court ordered wiretaps is denied. The motions of defendant Weisman are granted with respect to certain statements and denied as to others.

The background of this action, including the allegations of the Indictment, have been set forth in this court's opinion of August 26, 1978 and will not be repeated here. As part of the Government's investigation of the alleged illegal activities which resulted in the instant Indictment, five wiretap orders, two in California and three in New York, were obtained and it is the fruits of these wiretaps which the defendants seek to exclude in this case.

* * *

II. *Weisman's Motions*

Use of Immunized Testimony.

On November 17, 1975 defendant Weisman testified before a New York State grand jury, allegedly about matters concerning the Theatre. Subsequently Weisman testified before the Honorable Harold Schwartzberg, United States Bankruptcy Judge, in the *Matter of the Westchester Premier Theatre, Inc.* (Docket No. 76 B 2926), a proceeding under Chapter XI of the Bankruptcy Act. This court held an evidentiary hearing to determine whether the grand jury proceedings which resulted in the present Indictment were tainted by the use of immunized

testimony. After a review of all the evidence, including that submitted by the prosecution for in camera review,[40] it is the opinion of this court that there was no use of Weisman's testimony by the Government in obtaining the Indictment.

First, as to the New York State grand jury proceeding, Weisman signed a waiver of immunity form. Weisman having testified without any immunity, the Government would be free to use Weisman's testimony and therefore there is no taint.

As to Weisman's testimony in the bankruptcy proceeding, Weisman testified as an officer of the bankrupt corporation, not as the debtor in possession. According to the sworn testimony of Judge Schwartzberg, Weisman was not testifying under any grant of immunity; he was not designated by the court to perform the duties imposed upon the bankrupt. See *United States v. Castellano,* 349 F.2d 264, 273 (2d Cir. 1965), *cert. denied,* 383 U.S. 928, 86 S.Ct. 934, 15 L.Ed.2d 847 (1966); *United States v. Coyne,* 425 F.Supp. 171 (W.D.N.Y.1977). Therefore, there could be no taint resulting from Weisman's testimony in the bankruptcy proceeding.

Furthermore, the Government has satisfied this court that there was no use of Weisman's testimony in the bankruptcy proceeding in the investigation which led to the present Indictment. At the evidentiary hearing before this court the testimony of the Assistant United States Attorney in charge of this case negated any taint as to the Government's use of Weisman's testimony and stated affirmatively the sources of the evidence presented to the grand jury, namely, wiretaps, informants' evidence and the statements of certain of the co-conspirators. A review

[40] This *in camera* review included the material relating to the 1975-1976 investigation, and 1977 bankruptcy files of the FBI.

of the *in camera* information submitted to this court has established that the Government obtained the Indictment from legitimate sources independent of any of the Weisman testimony before the Bankruptcy Court, whether or not it was immunized. Therefore, the Government has satisfied its affirmative burden. See *United States v. Nemes,* 555 F.2d 51 (2d Cir. 1977). The Indictment will not be suppressed.

Weisman's Motion to Suppress.

Defendant Weisman has moved to suppress certain statements made subsequent to his arrest on September 16, 1977 on a warrant charging him with violating Title 18, United States Code, Section 1014, relating to bank fraud, a charge unrelated to the present Indictment. The complaint upon which the warrant was issued alleges that on or about February 6, 1976, Weisman and his wife knowingly made false statements in an application to obtain a bank loan to purchase certain property. Weisman asserts that the complaint was issued without probable cause and that the interrogation subsequent to his arrest (i) was therefore an unreasonable search and seizure, in violation of his Fourth Amendment rights, (ii) was under circumstances rendering the statements involuntary, abrogating his Fifth Amendment rights and (iii) was without the presence of counsel, abridging his Sixth Amendment rights.

The warrants for the arrest of Weisman and his wife were issued on September 13, 1977 after a finding of probable cause by a Magistrate of this court. Weisman was thereafter kept under surveillance, and it was decided not to make the arrest while he was in the company of others. At approximately 3:00 p. m. on Friday, September 16, 1977, Weisman was alone in his car and was arrested.

He was advised of the charge against him and was given his full *Miranda* warnings en route to FBI headquarters.

Upon arrival at FBI headquarters, he was shown an advice of rights form after being photographed and fingerprinted. During processing Weisman asked when he could place a call to his attorney and was told he could do so after the processing was completed. After processing he signed a Waiver of Rights form.[41] No call was placed to his attorney,[42] and he was not arraigned.

Weisman was then taken to an office in local FBI headquarters. At approximately 5:00 p. m. the Assistant United States Attorney arrived, again advised Weisman of his constitutional rights and informed him of the charges against him and his wife, including the possible racketeering charge against him and potential 20 year jail term thereunder.[43] Weisman was informed that although the

---

[41] The form states as follows:

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

[42] The Government treated this not as a request, but simply as an inquiry as to when he could call should he desire to do so. Upon completion of processing the Government should have informed Weisman that he was free to call his attorney.

[43] Assistant United States Attorney Akerman testified as follows:

Q. Mr. Akerman, have you given some instructions to Agent Fisk on September 16th to have him hold Mr. Weisman for your arrival?

A. No, I didn't instruct him to hold him for my arrival.

Q. Did you tell him you wanted him to wait until you had the opportunity to question Mr. Weisman?

A. No, because I was planning to be there at the same time that Mr. Weisman was brought there.

Q. Did you tell Mr. Fisk to have Mr. Weisman brought forthwith for arraignment?

A. No, I did not.

Q. You wanted to question him that night, did you not?

A. That's correct. Tr. 752, line 21-753, line 11.

Government could not make any promises, if he cooperated it would become known to the judge.[44]

Thereafter, Weisman was questioned, sometimes with as many as four people in the room. During the interrogation Weisman called his wife and asked her to meet him at FBI headquarters. Mrs. Weisman arrived at approximately 6:45 p. m., at which time she was advised by the Assistant United States Attorney of the warrant for her arrest and of her constitutional rights. Mrs. Weisman spoke to Weisman for a few minutes and placed a call to defendant DePalma; then Weisman requested that she leave the room. Mrs. Weisman remained in a waiting room while the questioning of Weisman continued until approximately 10:45 p. m. Weisman, due to his cooperation, was then permitted to return home with his wife.

The next day, a Saturday, Weisman was arraigned by the Honorable Whitman Knapp at his apartment. Weisman had expressed a fear that if he were arraigned publicly and not later prosecuted on that charge, certain others would suspect he was cooperating with the Government. At arraignment Judge Knapp informed Weisman of the complaint against him and of his constitutional rights. Weisman was then released on his own recognizance. Because Weisman feared for his physical safety, the complaint was sealed.

On Monday, September 19, 1977, Weisman met with the Assistant United States Attorney and two FBI agents at a motel in Connecticut which Weisman had chosen to assure secrecy. Prior to any conversation Weisman was again advised of his constitutional rights, and he signed

---

[44] Agent Fisk testified as follows:

Q. What was said next, Agent Fisk?

A. I don't recall exactly what was said next, but you asked for Mr. Weisman's cooperation in the cases.

Q. What else did I tell him about his cooperation?

A. You told him you couldn't make any promises to him and that his cooperation, if he did cooperate, would become known to a judge. Tr. 600, lines 2-10.

another Waiver of Rights form. Weisman then answered questions put to him by the Government agents.

The face of the complaint indicates that it was dismissed by the Government on October 2, 1977, although this date, a Sunday, appears to be erroneous. On October 4, 1977, Weisman again met with Government agents. After being advised of his constitutional rights Weisman refused to sign a Waiver of Rights form or to cooperate with the Government. He was subsequently indicted on the charges in the case sub judice.

The complaint charging bank fraud, signed by FBI agent Brendan M. Fisk ("Fisk"), alleged, in pertinent part, as follows:

> 2) On or about February 6, *1976,* an application for a home mortgage loan was submitted to the Union Savings Bank of New York, 101 Mamaroneck Avenue, Mamaroneck, New York, by the defendants ELIOT H. WEISMAN and MAXINE L. WEISMAN who are husband and wife. The loan application was signed by both defendants.
>
> 3) The loan application referred to in paragraph 2 states that the defendant ELIOT H. WEISMAN is the President of the Westchester Premier Theatre and that his annual income *is* $50,000 and that the defendant MAXINE L. WEISMAN *is* employed by the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York and that her annual income *is* $2,000. These statements were knowingly false.
>
> 4) The payroll records of the Westchester Premier Theatre show that the defendant ELIOT H. WEISMAN earned $36,143 in *1975* from the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York, and that the defendant MAXINE L. WEISMAN *was* not on the payroll of the

Westchester Premier Theatre in *1975.* (Emphasis added).

The complaint in paragraph 3 contains the allegation that the statements in the loan application were knowingly false, a handwritten allegation added by the Assistant United States Attorney just prior to taking the complaint to the Magistrate. The Complaint contains no facts to establish that at the time the loan application was filled out in February 1976 Weisman was not earning the amount set forth in the application.

In *Jaben v. United States,* 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed2d 345 (1964) the complaint, which was determined to set forth probable cause, alleged that the agent personally conducted an investigation in the course of which he examined defendants' tax returns, interviewed third persons and consulted public and private records as to the defendants' income. Although the complaint here, signed by Agent Fisk, states that the basis of his knowledge was "an investigation conducted in the regular course of duties" there is no allegation that he personally conducted the investigation. Fisk testified that he first learned about the bank loan charge one week prior to the preparation of the complaint and that the facts were supplied to him by the Assistant United States Attorney on the case.[45] This situation is similar to the one which

---

[45] Agent Fisk testified as follows:

Q. Was it Mr. Akerman who said to you that the government had concluded that they wished to arrest Weisman on that bank loan fraud charge?

A. Yes.

Q. You certainly did not bring it to his attention.

A. No. The facts were not—I wasn't in possession of the facts. Tr. 628, lines 5-12.

Q. Did you tell the magistrate what he earned in 1976?

A. No, I don't believe I did.

Q. The charge, though, had to do with 1976, did it not?

A. I presented the complaint on the approval of Mr. Akerman, who believed the probable cause, and it was signed, sir. Tr. 633, lines 18-25.

existed in *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1957), since "the complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainants' belief [other than the 1975 payroll records, which are insufficient]; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." *Id.* at 486. Neither the complaint nor the testimony indicates that Fisk had any personal knowledge or source information as to the conclusory statement concerning the falsity of Weisman's application,[46] nor do they set forth the facts to establish the criminal intent element of the crime charged. *See Pugach v. Klein,* 193 F.Supp. 630, 639 (S.D. N.Y.1961).

Although the Government alleges that at the time the complaint was prepared it had in its possession the federal tax returns of Weisman for 1975 and 1976, which indicated that in neither year did Weisman earn what was set forth in the loan application nor was his wife employed at the theatre, Fisk testified that he had reviewed only the

---

[46] Agent Fisk testified as follows:

Q. Mr. Fisk, was the Government's Exhibit 1 prepared by Mr. Akerman?

A. Yes, it was.

Q. It was typed at the U.S. Attorney's office?

A. Yes, sir.

Q. Did you make any changes on it?

A. May I look at it please?

Q. Yes, sir.

A. This additional statement was written in at the time.

Q. You are referring now to the bottom of the last full paragraph on page 1, "These statemens were knowingly false"?

A. That's correct.

Q. You wrote that?

A. No, I did not.

Q. Who did?

A. Mr. Akerman.

Q. Did you initial it?

A. Yes. Tr. 635, line 17-636, line 12.

1975 return before executing the affidavit. Furthermore, information derived from the tax returns was not contained in the complaint, nor was it submitted to the magistrate in the form of sworn testimony, nor did Fisk have knowledge concerning Weisman's 1976 income. Therefore, the tax returns cannot be considered in determining probable cause; "an adequate basis for such a finding had to appear on the face of the complaint" (*Girodenello v. United States,* 357 U.S. 480 487, 78 S.Ct. 1245, 1250, 2 L.Ed2d 1503 (1957)) or from sworn testimony. Fed. R.Crim.P. 41(c). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." (Emphasis in original). *Aguilar v. Texas, supra,* 378 U.S. at 109 n.1, 84 S.Ct. at 1511 (1963). A review of such information does not establish probable cause.

The absence of probable cause for the issuance of the warrant for the arrest of Weisman and the circumstances surrounding the arrest, require that his statements of September 16 be suppressed. The arrest afforded no lawful basis for procuring evidence with respect to an entirely different offense. *United States v. Edmons,* 432 F.2d 577, 582 (2d Cir. 1970).

A major purpose for arresting Weisman on the bank loan charge was to obtain his cooperation on the investigation into the Theatre. This is borne out by testimony at the hearing, the circumstances of the arrest, including the Government's desire to keep others involved in the Theatre from knowing of the arrest, and the interrogation of Weisman immediately subsequent to his arrest almost solely as to the Theatre. Indeed, there is evidence that on September 12, 1978, the occasion of Weisman's testimony before the grand jury, Weisman's

attorney had indicated to the Assistant United States Attorney that Weisman wished to cooperate.

The *Miranda* warnings given Weisman and his signature on a Waiver of Rights form do not cure the lack of probable cause and the need for suppression. *Brown v. Illinois,* 422 U.S. 590, 601—602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1974).

> Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. (Quotations in original.)

Id. at 602, 95 S.Ct. at 2261. Therefore, even if the statements by Weisman were determined by this court to have been voluntary under the Fifth Amendment,[47] the casual connection between the illegal arrest and the statements must be broken in order to purge the primary taint. *Brown, supra* at 601—02, 95 S.Ct. 2254; *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962). The determination of whether the statements were the product of free will must be determined by the facts of each case; "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Footnotes and citations omitted.]" *Brown, supra* at 603—04, 95 S.Ct. at 2261—62.

Weisman's arrest, and the surrounding circumstances, were part of a plan to assure his cooperation on a totally unrelated investigation. "The arrest, both in design and

---

[47] Due to the suppression based upon the Fourth Amendment this court need not address this issue.

execution, was investigatory." *Brown, supra* at 605, 95 S.Ct. at 2262. The questioning with respect to the Theatre as not merely incidental to the arrest, but one of the main purposes of the arrest.

However, a different issue is presented with respect to the statements made on Monday, September 19, 1977, more than two days after the illegal arrest. These statements fall somewhere between the second confession by the defendant in *Brown,* which was determined to be the result and fruit of the first, and that made by the defendant in *Wong Sun,* which was several days after the illegal arrest. To locate the September 19 statements on this spectrum all the surrounding facts and circumstances are relevant. *See Tanner v. Vincent,* 541 F.2d 932, 936 (2d Cir. 1976), *cert. denied,* 429 U.S. 1065, 97 S.Ct. 794, 58 L.Ed.2d 782 (1977); *United States v. Toral,* 536 F.2d 893, 896 (9th Cir. 1976).

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

United States v. Bayer, 331 U.S. 532, 540—41, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654 (1946).

A review of the facts and circumstances indicates that the conditions which made Weisman's first statements inadmissible did not carry over to invalidate the subsequent statements. The second meeting was held over

two days after Weisman's arrest. Weisman had been arraigned on the bank loan charge and released on his own recognizance. The meeting at which the statements were made took place at a motel chosen by Weisman and not in FBI headquarters. Weisman appeared on his own. Weisman's wife was not present, and there was no immediate threat of her arrest. Weisman was again given his *Miranda* warnings and signed a Waiver of Rights form. These intervening circumstances dissipated the original taint; there was a sufficient break in the stream of events to insulate the later statements. *Clewis v. Texas,* 386 U.S. 707, 710, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1966).

Furthermore, Weisman is a sophisticated businessman who was fully aware of his rights and who had just testified before the grand jury and had consulted counsel in connection with that testimony. He had an opportunity over the weekend to consult with his attorney or anyone else, although there is no testimony before this court that he did so. His statements of September 16 were not recorded, other than some sketchy notes by one agent, and he signed no written confession or similar document. The statements at the second meeting appear to have resulted from a voluntary and informed decision by Weisman to cooperate with the Government, *cf. United States v. Galante,* 547 F.2d 733 (2d Cir. 1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *United States v. Mullens,* 536 F.2d 997 (2d Cir. 1976), and not stimulated by a belief that he had nothing to lose. See generally *Knott v. Howard,* 511 F.2d 1060 (1st Cir. 1975). They were not the direct result and fruit of the first *Brown, supra* at 605; nor were they obtained in violation of his Fifth or Sixth Amendment rights. The September 19, 1977 statements of Weisman will not be suppressed.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of June, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA. *Appellee,* *v.* ELIOT WEISMAN, *Appellant.*	79-1315

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Due to his untimely death on February 16, 1980, Judge Smith, a member of the panel, did not participate in the consideration of this petition.

/s/ IRVING R. KAUFMAN
Chief Judge

IRVING R. KAUFMAN

No. 80-62

OCT 1980
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELIOT H. WEISMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
PHILIP B. HEYMANN
Assistant Attorney General
DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-62

ELIOT H. WEISMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court's instructions on the racketeering enterprise count constituted reversible error.

2. Whether petitioner's confession was properly admitted into evidence.

3. Whether petitioner waived his reverse immunity claim in the district court.

4. Whether petitioner's Sixth Amendment right to counsel was violated by the admission into evidence of tapes of his conversations with a government informant that were surreptitiously recorded with the consent of the informant.

5. Whether the district court erred in instructing the jury with respect to two terms that were used in the indictment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Brown v. *Illinois*, 422 U.S. 590	13
Dunaway v. *New York*, 442 U.S. 200	13
Henderson v. *Kibbe*, 431 U.S. 145	7
Kirby v. *Illinois*, 406 U.S. 682	17
Massiah v. *United States*, 377 U.S. 201	16
Rawlings v. *Kentucky*, No. 79–5146 (June 25, 1980	13
United States v. *Ceccolini*, 435 U.S. 268	13
United States v. *DePalma*, 476 F.Supp. 775	14
United States v. *Edwards*, 366 F.2d 853, cert. denied, 386 U.S. 919	17
United States v. *Elliott*, 571 F.2d 880, cert. denied, 439 U.S. 953	6
United States v. *Henry*, No. 79–121 (June 16, 1980)	16
United States v. *Hinton*, 543 F.2d 1002, cert. denied, 429 U.S. 980	17
United States v. *Horwitz*, 622 F.2d 1101, pertition for cert. pending, No. 79–2065 (filed June 27, 1980)	2, 14, 16
United States v. *Kaye*, 556 F.2d 855, cert. denied, 434 U.S. 921	6

Cases—Continued: Page

United States v. *Missler*, 414 F.2d 1293, cert. denied, 397 U.S. 913 17
United States v. *Turkish*, Nos. 79–1326 and 79–1396 (2d Cir. May 27, 1980) 14
United States v. *Weatherspoon*, 581 F.2d 595 6
Wong Sun v. *United States*, 371 U.S. 471 . 13

Constitution, statutes and regulation:

United States Constitution, Sixth Amendment 16
15 U.S.C. 77q(a) 1
15 U.S.C. 77(x) 1
18 U.S.C. 152 1
18 U.S.C. 371 1
18 U.S.C. 1014 9
18 U.S.C. 1503 2
18 U.S.C. 1961(1) 7
18 U.S.C. 1961(1)(D) 8
18 U.S.C. (Supp. II) 1961(1)(D) 8
18 U.S.C. 1961(5) 6
18 U.S.C. 1962(c) 1, 7
17 C.F.R. 230.408 18

Miscellaneous:

116 Cong. Rec. 35295 (1970) 6
Fed. R. Crim. P. 29 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-28) is not yet reported. The pre-trial opinions of the district court (Pet. Supp. App. B-1 to B-19, B-20 to B-33) are reported at 461 F. Supp. 778 and 461 F. Supp. 800. The post-trial opinion of the district court (Pet. App. C-1 to C-3), on remand from the court of appeals, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1980. A petition for rehearing was denied on June 10, 1980 (Pet. Supp. App. D-1). The petition for a writ of certiorari was filed on July 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and nine co-defendants were indicted in June 1978 on charges arising out of the creation, operation, and bankruptcy of the Westchester Premier Theatre in Tarrytown, New York. Following a two-month jury trial, petitioner was convicted on one count of operating the Theatre through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), nine counts of fraud in the sale of securities, in violation of 15 U.S.C. 77q(a) and 77(x), nine counts of bankruptcy fraud, in violation of 18 U.S.C. 152, one count each of conspiracy to commit securities fraud and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371, and one count of endeavoring to obstruct a grand-jury investigation, in violation of 18 U.S.C.

1503.[1] Petitioner was sentenced to six and one-half years' imprisonment, to be followed by a three-year term of probation, and fines totalling $15,000. The court of appeals affirmed (Pet. App. A-1 to A-28).

The evidence at trial showed that the Theatre, from its inception to its collapse, was operated through a wide-ranging pattern of fraud. In May 1973, petitioner and his partners Gregory J. DePalma and Richard Fusco sought to raise more than $2 million for the construction of the Theatre through a fraudulent public offering of 300,000 shares of common stock. By the terms of the public offering, at least 275,000 of the shares had to be sold by June 12, 1973, the closing date for the offering. If this minimum number of shares was not sold by that date, the monies paid by investors for the stock would have to be refunded (Tr. 1553, 1232; GX 5, 6AAA).[2] The prospectus filed with the Se-

---

[1] A previous trial, which lasted three months, ended in a mistrial when the jury deadlocked as to all defendants except Anthony Gaggi, who had previously been granted a verdict of acquittal under Fed. R. Crim. P. 29. Following the mistrial, co-defendants Richard Fusco, Gregory J. DePalma, Louis Pacella, and Thomas Marson pleaded guilty to various charges. The second trial involved only petitioner and co-defendants Murad Nersesian, Salvatore J. Cannatella, and Leonard Horwitz; co-defendant Laurence I. Goodman was not retried. After four days of deliberations, the jury acquitted Nersesian on all counts and returned guilty verdicts on all counts against petitioner, Cannatella, and Horwitz. The court of appeals affirmed these convictions. See Pet. App. A-1 to A-28; *United States* v. *Horwitz*, 622 F.2d 1101 (2d Cir. 1980), petition for cert. pending, No. 79-2065 (filed June 27, 1980).

[2] The citations herein to the record are taken from the government's brief in the court of appeals. "Tr." refers to the trial transcript; "GX" refers to the government's exhibits at trial; and "App." refers to the joint appendix in the court of appeals.

curities and Exchange Commission failed to disclose several significant facts to prospective investors: (1) that DePalma and Fusco, both of whom had criminal records, were principals in the Theatre (Tr. 851, 872-875, 878-881, 912-914, 919, 947, 1396-1397, 3854-3855; GX 3A-B, 5); (2) that approximately $375,000 had been loaned to the Theatre, much of it at usurious interest rates;[3] (3) that a portion of the $375,000 had been used to buy stock in nominee names controlled by petitioner and his partners, in order to create the false impression that the Theatre stock was being purchased by the investing public (Tr. 994-1002, 1004-1007, 1562-1580, 1591-1598, 2200-2201; GX 3G-N, 3AA, 3CC-GG, 6D-6CC, 6BBB, 6CCC, 11A); and (4) that certain investors had been induced to buy Theatre stock by cash pay-offs, guarantees against loss, promises of extra shares out of petitioner's holdings of 455,000 shares, and promises of business from the Theatre (Pet. App. A-4; Tr. 1684-1686; GX 5, 6AAA).[4]

---

[3]Petitioner received $50,000 from John Capra, $125,000 or more from Murad Nersesian, $100,000 from Carlo Gambino, $50,000 from Ruby Weiner, $20,000 from Nino Gaggi, $10,000 from Nick Saldi, and $20,000 from Charles Carino. These loans were not disclosed to the public. Instead, the only disclosure of the loans in the prospectus was that "[i]n December 1972 and February 1973 the Company borrowed an aggregate of $45,000" and that "on May 22, 1973 Mr. Weisman loaned the Company $20,000." However, even the statement concerning the $20,000 loan from Weisman was false, since this money was actually a loan from Nick Saldi and other undisclosed sources (Tr. 933-950, 964-969, 993-994, 996-997, 1051-1052, 1097-1098, 1397-1400, 2488-2501, 2513-2514, 2524, 2605; GX 2EEE, 2FFF, 3F, 3Y, 6AAA).

[4]For example, petitioner arranged through Leonard Horwitz for Warner Communications to purchase 20,000 shares of

Due to these efforts, the public offering was successful. The Theatre opened in March 1975, at which time petitioner and his confederates began systematically to skim and convert to their own use money received by the Theatre from ticket sales and various concessions. Portions of these funds were also used to pay back various secret debts incurred during the public offering (Pet. App. A-4). The secret loans and the Theatre profits skimmed to pay the usurious interest on them were not reflected in the Theatre's books and records (Tr. 1088-1089, 1097-1098, 2501, 3181-3182).

In December 1976, as a result of the massive skimming of its proceeds, the Theatre filed a petition in federal bankruptcy court pursuant to Chapter XI of the Bankruptcy Act and was adjudicated a "debtor-in-possession." Under Chapter XI, the Theatre was permitted to continue operations without having to

---

Theatre stock for $150,000. He did so by giving two Warner executives, Jay Emmett and Solomon Weiss, a $50,000 cash pay-off (Tr. 952-958, 1419, 1609-1611, 2235; GX 10A-D). Petitioner also induced the George A. Fuller Company to purchase 10,000 shares by guaranteeing it against loss and promising it the construction contract for the Theatre. Similar secret deals were made with numerous other companies and individuals (Tr. 925-928, 1613, 1681-1683, 2202, 2207, 2458, 2514-2516; GX 7A, 11A, 16A-C, 39).

Before the Theatre opened, Warner Communications was induced to buy another 20,000 shares of stock for $100,000—at least $80,000 above the market price—and to make an additional secret payment to the Theatre of $50,000; in return, the Theatre gave Emmett $20,000 in cash and promised that, after the Theatre opened, Emmett and Weiss would receive between $100,000 and $150,000 in cash (Tr. 1611-1627, 2236, 2323-2326, 2531-2533, 2841; GX 4H, 4L, 6LL-NN, 6BBB, 10E-HH, 12A-D).

make immediate payments to its creditors. At the same time, attempts were made to reach an arrangement with the Theatre's creditors to settle their claims using the profits of the Theatre. As a "debtor-in-possession," the Theatre was authorized to pay only salaries and operating expenses; all other expenditures were required to be approved by the bankruptcy court (Pet. App. A-5; Tr. 3052-3055; GX 52, 54). During the Chapter XI proceedings, petitioner, Cannatella, and the others continued to skim from the Theatre's proceeds as they had throughout 1975 and 1976, while attempting to force the Theatre's legitimate creditors to accept a settlement of 10 to 15 cents on the dollar.

In May 1977, a federal grand jury began investigating the operations of the Theatre. At that time, petitioner and Horwitz attempted to persuade various prospective grand jury witnesses not to disclose the fraudulent transactions (Pet. App. A-5).

ARGUMENT

1. Petitioner's principal contention is that the district court's charge to the jury on the RICO count was erroneous. Petitioner makes two separate arguments on this point. First, he contends (Pet. 8-12) that the court erred in denying his request that the jury be instructed that even if it found that he had committed two or more predicate acts of racketeering within a 10-year period, an unlawful "pattern of racketeering" would not be established unless the predicate acts were also found to be "related" to each other through a "common scheme, plan or motive" (Pet. App. A-7). Second, he contends (Pet. 12-14) that the court incorrectly charged the jury that the two conspiracy counts

alleged in the indictment could constitute the predicate acts of racketeering required under Section 1962(c).

a. Both the language of the statute and its legislative history refute petitioner's claim that the predicate acts of racketeering must be specifically "related" to each other. By its express terms, the statute defines a "pattern of racketeering activity" to require only two acts of racketeering activity within a 10-year period. 18 U.S.C. 1961(5). Moreover, as the court of appeals observed (Pet. App. A-9), "the enterprise itself supplies a significant unifying link between the various predicate acts." See *United States* v. *Elliott*, 571 F.2d 880, 899 & n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978).[5]

The legislative history of the statute, which is reviewed in detail in the district court's opinion (Pet. Supp. App. B-4 to B-8), confirms that Congress meant what it said in defining "pattern of racketeering activity" as it did in Section 1961(5).[6] After considering the extensive time and effort that Congress devoted to arriving at the definition of "pattern of racketeering activity," the district court correctly con-

---

[5] Petitioner contends (Pet. 11-12) that the decision below conflicts with *United States* v. *Kaye*, 556 F.2d 855, 860-861 (7th Cir.), cert. denied, 434 U.S. 921 (1977). See also *United States* v. *Weatherspoon*, 581 F.2d 595, 601 n.2 (7th Cir. 1978). However, the court in *Kaye* held only that the acts charged in that case were sufficiently related to establish a "pattern" even under the standard advanced by the defendant.

[6] Congressman Poff, the sponsor of the bill in the House, clearly stated that "[a] 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which * * * must have occurred subsequent to enactment of the title." 116 Cong. Rec. 35295 (1970).

cluded (Pet. Supp App. B-5) that if Congress had wanted to provide for any greater degree of "relatedness," it would have said so.

In any event, the court of appeals found in the present case that "the predicate acts of racketeering were closely related" and that petitioner's contention "that a jury could find that the acts of racketeering activity he engaged in were sporadic and unrelated [is] completely untenable" (Pet. App. A-10 to A-11 n.4; see also Pet. Supp. App. B-9, B-10 to B-11); indeed, as the court noted (Pet. App. A-10), "a more appropriate application of the statute would be difficult to imagine." Petitioner does not contend that this assessment was incorrect. Accordingly, the instant case does not present a suitable occasion to resolve any question that may exist concerning the definition of a "pattern of racketeering activity" under RICO.

b. Petitioner's second claim—that a conspiracy offense cannot be a predicate act of racketeering under Section 1962(c)—is also without merit. First, the instruction he now complains of was the very one he requested. See App. 76a. Having sought the charge given by the district court, he may not now be heard to object. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

At all events, the district court's charge was proper. At the time of the trial, Section 1961(1) provided that

> 'racketeering activity' means * * * (D) *any offense involving* bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous

> drugs, *punishable under any law of the United States;*

18 U.S.C. 1961(1)(D) (emphasis added).[7] As the court of appeals stated (Pet. App. A-12):

> This language is certainly broad enough on its face to include conspiracies involving securities and bankruptcy fraud and drug related offenses. The deletion of conspiracy from earlier drafts of RICO does not undermine this conclusion. In those drafts, the conspiracies chargeable as predicate acts could relate to a broad number of offenses now listed in subsections (A) to (C) of section 1961. While this specific reference to conspiracy was deleted from the final version of RICO, the expansive language quoted above was retained in a separate section—section 1961(1)(D). Thus, the alterations of section 1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D). This conclusion is bolstered by the fact that subsections (B) and (C), which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.

Finally, even if the two conspiracy counts could not be charged as predicate acts of racketeering, such error was harmless in this case because the jury also found petitioner guilty of nine substantive counts of

---

[7] Effective October 1, 1979, this section was amended to substitute "fraud connected with a case under title 11" for "bankruptcy fraud." 18 U.S.C. (Supp. II) 1961(1)(D).

bankruptcy fraud and nine counts of fraud in the sale of securities, all of which were charged as predicate acts of racketeering.[8] As the court of appeals found (Pet. App. A-13 to A-14), "the jury could not have rationally concluded that the conspiracies to commit bankruptcy and securities fraud occurred in the conduct of the Theatre's affairs without also finding that the substantive offenses carried out in the course of the conspiracies also took place in the conduct of the Theatre's affairs." Petitioner does not question the correctness of the court of appeals' determination that any error in the jury instruction was harmless, and thus further review is unwarranted.

2. Petitioner next urges (Pet. 14-16) that the district court erred in not suppressing certain inculpatory statements he made to the government on September 19, 1977. Petitioner had been arrested on September 16 pursuant to a warrant issued by a magistrate against him and his wife for allegedly making false statements on a bank loan application, in violation of 18 U.S.C. 1014 (a charge unrelated to the present indictment). Petitioner was twice advised of his *Miranda* rights and, after signing a waiver of rights form, was questioned by Assistant United States Attorney Nathaniel Akerman. The focus of the interview soon shifted from the alleged bank loan fraud to the subject of the government's investigation of the crimi-

[8]The district court concluded that the nine counts of securities fraud could constitute only a single predicate act of racketeering because they arose "out of the same episode" (Pet. App. A-13 n.5). Thus, aside from the two conspiracy counts, there were 10 separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count.

nal activity involving the Theatre. Akerman outlined some of the government's evidence and informed petitioner that he might receive a 20-year prison term for racketeering.[9] Petitioner was told that if he cooperated in the grand jury's ongoing investigation of the Theatre's operations, the fact of his cooperation would be brought to the attention of the judge. Petitioner responded that he would cooperate in any way he could (Pet. App. A-15 to A-16; Pet. Supp. App. B-24 to B-26; App. 403a-410a, 415a-416a, 480a). Throughout the interview, Akerman repeatedly advised petitioner that he had the right to counsel and that he could call any lawyer he wished (App. 414a-415a; see also Pet. 15 n.9).

At the conclusion of the interview, petitioner was told that he would have to be arraigned on the false bank loan complaint the next morning before a United States magistrate. However, petitioner stated that if he were arraigned publicly before a magistrate and if he were not later prosecuted on the bank loan charge, DePalma and Fusco would suspect that he was cooperating with the government. Because petitioner feared for his physical safety, Akerman arranged to have petitioner arraigned at the home of a district judge the following day (App. 416a-418a). The judge informed petitioner of the complaint against him and advised him of his constitutional rights. With the government's consent, the judge released petitioner on his own recognizance (Pet. App. A-16; Pet. Supp. App. B-26; App. 417a-418a, 603a, 688a-689a, 696a).

[9] Akerman also played an incriminating tape recording of a conversation in which petitioner had discussed with DePalma the division of the skim from a Frank Sinatra concert (GX 2QQ).

Two days later, on September 19, 1977, petitioner met with Akerman and two FBI agents at the Sheraton Motel in Riverside, Connecticut, a location chosen at petitioner's request because he was afraid of being seen either at the United States Attorney's office or the FBI office. After again being advised of his rights and signing a second waiver form, petitioner answered questions regarding the operation of the Theatre. On October 2, 1977, the complaint against petitioner and his wife concerning the bank loan application was dismissed on the government's motion. At that time the government believed that petitioner would cooperate and plead guilty to a felony carrying at least a five-year penalty (App. 418a–420a, 423a–424a). On October 4, 1977, petitioner appeared at the United States Attorney's office to discuss his cooperation with the government. He acknowledged that he had been advised of his rights on all previous occasions and that he understood those rights. There was no further discussion, however, because petitioner stated that he wished to seek counsel (App. 424a–427a).[10] Petitioner thereafter declined to cooperate further with the government, and the instant indictment was subsequently returned (Pet. App. A–16; Pet. Supp. App. B–27).

---

[10] After it became obvious that petitioner would not cooperate, the government continued to pursue its investigation into the false statements on the bank loan application. In that regard, witnesses testified before the grand jury as late as December 9, 1977. However, the government decided that its efforts would be better spent pursuing the Theatre investigation than bringing petitioner to trial on the bank loan charge—particularly since the statute of limitations on the latter charge was about to run (App. 427a–428a).

Prior to trial, petitioner moved to suppress his statements of September 16 and 19 as the products of an illegal arrest. The district court ruled that the arrest had been improper because the complaint did not provide an adequate basis for the magistrate to find probable cause. The court also found that "one of the main purposes" for arresting petitioner on the bank loan charge was to obtain his cooperation in the investigation into the Theatre (Pet. Supp. App. B-32).[11] Accordingly, the court suppressed petitioner's statements of September 16. However, it denied the motion to suppress the September 19 statements, concluding that the intervening circumstances had sufficiently dissipated the taint of the original arrest (*id.* at B-32 to B-33). Specifically, the court noted the three-day lapse between the arrest and the statement, the formal arraignment before the district judge, the release of petitioner on his own recognizance and the accompanying opportunity to consult with counsel, the fact that the September 19 interview took place at a motel chosen by petitioner and not in FBI headquarters, and petitioner's informed waiver of his rights (*ibid.*). The court also took into consideration that petitioner was

---

[11] Contrary to petitioner's statement (Pet. 6), the district court did not find that the bank loan arrest had been "a mere pretext" to induce petitioner to cooperate in the government's investigation into the Theatre or that the government had otherwise acted in bad faith. See Pet. App. A-18. The FBI agents arrested petitioner in good faith for the felony charge of making a false statement on a bank loan application. That they first presented the facts in their possession to a magistrate and obtained an arrest warrant, despite their authority to effect a warrantless arrest, clearly refutes petitioner's claim of gross misconduct.

"a sophisticated businessman who was fully aware of his rights and who had just testified before the grand jury and had consulted counsel in connection with that testimony" and that petitioner's "statements of September 16 were not recorded, other than some sketchy notes by one agent, and he signed no written confession" (*id.* at B-33). Based on these findings, the district court concluded that "[t]he statements at the [September 19] meeting appear to have resulted from a voluntary and informed decision by [petitioner] to cooperate with the Government * * *" (*ibid.*).

The court of appeals agreed with this attenuation analysis (Pet. App. A-18). It sustained the district court's determination that the September 19 statements were "the result of a 'voluntary and informed decision by [petitioner] to cooperate with the government' rather than the direct fruit of the September 16 illegal arrest" (*id.* at A-17). On this record, the court concluded that the statement was admissible because "the taint of the original arrest had been purged by intervening circumstances" (*id.* at A-18).

The decisions below are correct and, in any event, merely involve application of well-settled principles to the particular facts of this case. See, *e.g.*, *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 7-12; *Dunaway* v. *New York*, 442 U.S. 200, 216-219 (1979); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963). Accordingly, further review by this Court is not warranted.[12]

---

[12] We also note that petitioner's September 19 statement, which related exclusively to the bankruptcy fraud, was almost

3. Petitioner next argues (Pet. 16–17) that the courts below erred in ruling that he waived his claim to immunity for prospective defense witnesses by failing to raise the issue in the district court. Petitioner's argument is insubstantial. As the court of appeals stated (Pet. App. A–19), "[a]lthough the issue of reverse immunity was raised by [co-defendant] Horwitz in both trials and in his post-conviction motion for a new trial, [petitioner] never moved during either trial to immunize any potential defense witnesses and never sought post-conviction relief from the district court on this ground."[13]

---

wholly cumulative of other evidence presented at trial, including tape recordings of his own conversations, and that petitioner's guilt on the bankruptcy fraud charges was established by overwhelming evidence apart from his statement. Thus, any error in the admission of his September 19 statement was harmless beyond a reasonable doubt.

[13] Following his conviction, Horwitz moved for a new trial on the ground that he had been denied due process by the government's use of immunity for its own witness but its refusal to grant immunity to two of his witnesses, the Warner executives Emmett and Weiss, who themselves were under a continuing government investigation for their role in the Theatre's affairs and were therefore unwilling to testify unless immunized. The district court granted Horwitz's motion for a new trial at which the testimony of the government's immunized witness would be suppressed if Horwitz's witnesses were not similarly immunized. *United States* v. *DePalma*, 476 F. Supp. 775 (S.D. N.Y. 1979). Upon the government's appeal, the court of appeals remanded the case for further consideration in light of the intervening decision in *United States* v. *Turkish*, Nos. 79–1326 and 79–1396 (2d Cir. May 27, 1980), which had "undercut the analytical foundation" of the district court's decision on the reverse immunity issue. *United States* v. *Horwitz*, 622 F.2d 1101, 1105 (2d Cir. 1980), petition for cert. pending, No. 79–2065 (filed June 27, 1980).

After he had filed a notice of appeal from his conviction, and after the district court had ruled favorably on Horwitz's motion for a new trial, petitioner moved the district court to clarify the record to indicate that he too had presented the reverse immunity claim. The court denied the motion, but the court of appeals subsequently remanded the case to the district court to determine whether petitioner had previously raised the reverse immunity issue. On remand, the district court concluded that petitioner "failed to properly raise the issue of reverse immunity prior to the time of appeal" (Pet. App. C-3). The court acknowledged that during both trials a motion made by one defendant was deemed to be adopted by all defendants, but it explained that this practice was employed primarily with respect to evidentiary objections and did not extend to post-trial proceedings (*id.* at C-2). Hence, Horwitz's post-conviction motion for a new trial did not raise a similar claim on behalf of petitioner.[14]

Moreover, as the district court observed, petitioner and Horwitz were in different evidentiary postures; while "the immunized testimony against Horwitz made up the bulk of the evidence against him" (Pet. App. C-2 to C-3), that was not the case with petitioner, whose guilt was supported by overwhelming evidence that not only proved his role in the Warner transactions but also demonstrated his undisputed leadership

---

[14] Petitioner's assertion (Pet. 16 n.11) that Horwitz's counsel advised the court that petitioner also joined in the reverse immunity motion distorts the record. The record shows (Tr. 3863-3881) that Horwitz's counsel was referring to a completely unrelated motion; the reverse immunity claim was not mentioned.

in every other aspect of the stock fraud scheme. Thus, any exculpatory testimony by Emmett and Weiss, aside from its doubtful reliability, would have affected only a portion of the government's case against petitioner. In these circumstances, the district court correctly concluded (Pet. App. C-3) that "it would have been incumbent upon [petitioner] * * * to address the proof as it applied to him in order to advance the same claim [as Horwitz] of deprivation of a constitutional right." The court of appeals saw "no reason to disturb this ruling" (*id.* at A-20), noting that "a contrary rule would force the district judge to determine on his own initiative and without assistance which particularized requests of one defendant should be extended to other co-defendants" (*id.* at A-21).[15]

4. Petitioner further claims (Pet. 19-20) that the district court erred in admitting into evidence tapes of his conversations with government informant Norman Brodsky that had been surreptitiously recorded with Brodsky's consent. Petitioner asserts that the introduction of the tapes violated his Sixth Amendment right to counsel under *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, No. 79-121 (June 16, 1980).

---

[15] In any event, as we discuss in our Brief in Opposition in *Horwitz* v. *United States*, petition for cert. pending, No. 79-2065, a copy of which is being sent to counsel for petitioner, Horwitz's argument for reverse immunity is without merit, and petitioner's claim certainly fares no better; indeed, because of the differences in evidence against them, petitioner is in a far weaker position to contend on the merits that he was deprived of a fair trial.

The district court correctly rejected this claim (Pet. Supp. App. B-12 to B-13) on the ground that, at the time the recordings were made, petitioner was not facing adversary judicial proceedings. See *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). Petitioner's tape-recorded conversations with Brodsky occurred two months after the bank loan complaint had been dismissed (see page 11, *supra*) and six months before the instant indictment was returned. Since no criminal proceedings were pending against petitioner, his *Massiah* claim is completely unfounded. See *United States* v. *Hinton*, 543 F.2d 1002, 1015 (2d Cir.), cert. denied, 429 U.S. 980 (1976); *United States* v. *Missler*, 414 F.2d 1293, 1302 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970); *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), cert. denied, 386 U.S. 919 (1967).

5. Petitioner's final contention (Pet. 17-19) is that the district court improperly failed to define for the jury the terms "promoter" and "principal operator" that were used in the indictment. The indictment stated that the prospectus for the Theatre contained a section entitled "management," which purported to set forth the identities of the executive officers of the Theatre. The indictment alleged that DePalma and Fusco were not identified in that section or elsewhere in the prospectus as "principal operators and promoters of the Theatre" and that the absence of their names was a material omission. The government's proof at trial showed that, before and during the public stock offering, DePalma and Fusco shared equal control of the Theatre with petitioner and were described by petitioner as his partners (Tr. 1587-1588).

At petitioner's request, the district court took judicial notice of the definition of "promoter" found in the SEC regulations and read the definition to the jury (Tr. 3855-3858); the term "principal operator," the court noted, is not defined in the regulations (Tr. 4741-4742). The court then instructed the jury that they had to determine whether the failure to mention DePalma and Fusco in the prospectus, in light of their role in the management of the Theatre, was a material omission (*ibid.*).

Petitioner argues that the court's failure to define "principal operator" or to require that the jury apply the SEC's definition of "promoter" exposed him to criminal liability for conduct that is not proscribed by the securities laws. However, to convict petitioner of the charged securities violations, the jury had to find, as it was correctly instructed, that the alleged omission existed and was material. Moreover the SEC regulations expressly provide that, in addition to information specifically required, a registration statement must also contain "such further material information * * * as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading." See 17 C.F.R. 230.408. Accordingly, the instructions in this regard were not erroneous.[16]

---

[16]There is no basis for petitioner's assertion (Pet. 18 n.15) that the lack of a definition of the term "principal operator" might have led the jury to find that DePalma and Fusco were "principal operators" based on their participation in entities that had direct dealings with the Theatre, such as the parking concession or the company that provided fill for the Theatre's construction site. The district court instructed the jury that it had

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
PHILIP B. HEYMANN
Assistant Attorney General
DAVID B. SMITH
Attorney

SEPTEMBER 1980

---

to find that DePalma and Fusco were "operators" at the "time of the public offering," and there was no evidence that DePalma or Fusco had anything to do with either of those other companies at the time of the public offering (Tr. 4741–4742; App. 104a–105a).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 327438 62